UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E. I. DUPONT DE NEMOURS AND COMPANY	)	
AND	)	Case No. 5-CA-33461
AMPTHILL RAYON WORKERS, INC., INTERNATIONAL BROTHERHOOD OF DU PONT WORKERS	)	

BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE MICHAEL A. ROSAS

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INTRODUCTION

This case centers upon whether Respondent E.I. DuPont de Nemours and Company ("DuPont" or "the Company") had the right to make changes unilaterally to two corporate-wide employee benefit plans through which benefits are provided to retirees – its Dental Assistance Plan ("Dental Plan") and Medical Care Assistance Program (MEDCAP).

The operative agreements giving DuPont the right to change the plans unilaterally were reached literally decades ago. In 1976, DuPont offered the Ampthill Rayon Workers Union ("the Union") the opportunity to have its members participate in the Dental Plan. A decade later, DuPont offered Union members the opportunity to participate in MEDCAP. In both instances, the Company informed the Union that its members could participate in the plans only if the Union agreed to the "reservation of rights" provision contained in the plan documents. The reservation of rights provisions, on their face, grant the Company the right to modify or terminate the plans at its discretion. The MEDCAP reservation of rights provision read, and continues to read:

> The Company reserves the right to amend any provision of the Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company.

The Dental Plan contained a similar reservation of rights clause, providing the Company the right to "amend or discontinue" the Plan in its discretion.

The Company demanded the Union's agreement to these reservations of rights as the price of admission to the Dental Plan and MEDCAP because those plans, being Company-wide plans, cover tens of thousands of participants who worked at DuPont facilities nationwide, the vast majority of which are not, and have never been, represented by the Union.

Based on a record of largely undisputed facts, Administrative Law Judge ("ALJ") Michael A. Rosas found that, after extensive bargaining over the plans' reservation of rights

language, the Union "agreed to participation in DAP . . . subject to the Company's reservation of rights" in 1976, and "agreed to participation in the new Aetna Plan (MEDCAP), including the reservation of rights clause contained in the Plan Document" in 1986. (ALJD 4:17-20; 6:23-29)[1] (emphasis added). He likewise found that the operative reservation of rights language has not changed since the Union agreed to it. The undisputed record also demonstrates, and the Judge's decision acknowledges, that: (1) "the Company engaged in a decades-long practice of corporate-wide unilateral changes," including "changes to premiums, co-pays and deductibles for retirees, and eligibility criteria"; (2) "the Company's unilateral changes tended to reduce or restrict benefits"; (3) the Company never sought the Union's agreement before announcing and implementing changes to MEDCAP and the Dental Plan; and (4) the Union did not file a single grievance or unfair labor practice charge challenging the Company's right to change the plans unilaterally at any time prior to the 2006 changes at issue here. (ALJD 16:4-5; 9:20-22, 33-34; 10:36-37). Virtually all of the Judge's factual findings, and the undisputed record that supports them, compel the conclusion that the Union agreed to an express waiver of its right to bargain over changes to MEDCAP and the Dental Plan as the *quid pro quo* for its members' participation in both benefit plans.

Ignoring the conclusions that logically follow from the undisputed record and his own factual findings, Judge Rosas concluded that there was no waiver by the Union. As demonstrated below, that conclusion is both legally and factually erroneous for several reasons.

First, while Judge Rosas stated correctly that the Union objected to, and initially refused to agree to, the relevant reservation of rights provision, he failed to mention the undisputed fact

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[1] References to the Decision of ALJ Rosas will be designated as "ALJD," followed by the page and line number(s) cited.

that the Company, during bargaining, made it crystal clear that Union members would not be permitted to participate in the plans unless the Union agreed to the reservation of rights language. The Union's agreement to the reservation of rights language was the explicit *quid pro quo* for Union members' participation.

Second, the Judge failed to recognize the legal implications of his finding that the Union and Company specifically bargained over the inclusion of the reservation of rights language in both plans, and that *the Union agreed to participate in the plans subject to the reservation of rights language.* (ALJD 4:17-20; 6:23-29). The agreed-upon reservation of rights language, on its face, grants the Company the right to modify or terminate the benefit plans at the Company's discretion, and as such, constitutes a clear and unmistakable waiver of the Union's right to bargain over future benefit plan changes, including the 2006 changes at issue here.

Third, the Judge's analysis of the Company's decades-long past practice of unilateral changes to MEDCAP and the Dental Plan is both factually and legally erroneous. The testimony of each witness and the documentary evidence adduced at the hearing shows that the Company had an uninterrupted history of making unilateral changes to both MEDCAP and the Dental Plan, including changes that were significant and clearly adverse to the interests of Union members, without objection by the Union. Indeed, the Union's sole witness – Donny Irvin – conceded that DuPont made unilateral changes to MEDCAP and the Dental Plan each and every year since 1993. Despite that evidence, the ALJ erroneously concluded that "the Company had an unclear history of implementing unilateral changes," finding that the Company had "bargained" over some prior benefit plan changes merely because it responded to Union information requests concerning those changes. In effect, the Judge found that by responding to information requests concerning certain benefit plan changes, the Company somehow conceded, *sub silentio*, that it

lacked the right to make those changes unilaterally. That conclusion is both erroneous as a matter of law and wholly inconsistent with sound labor-relations policy.

Fourth, the Judge misapplied the holdings and rationales of several controlling Board decisions with respect to the appropriate analysis of past practice evidence, including the Board's decisions in *Courier Journal*, 342 NLRB 1093 (2004) and the more recent *DuPont* cases. *E.I. DuPont de Nemours (Louisville Works)*, 355 NLRB No. 176 (2010); *E.I. DuPont de Nemours*, 355 NLRB No. 177 (2010).

Fifth, the Judge's remedial order is inappropriate because it seeks to require DuPont to render employees hired after January 1, 2007 eligible for retiree medical benefits under MEDCAP and the Dental Plan. The appropriate remedy, assuming a violation, is to restore the *status quo ante* by requiring the Company to rescind the MEDCAP and Dental Plan amendments it announced and implemented in 2006, which would not render post-January 1, 2007 hires eligible for benefits under those plans for reasons unrelated to the changes at issue in this case.

PROCEDURAL HISTORY

The Acting General Counsel filed his Complaint on December 28, 2010, alleging that DuPont violated Sections 8(a)(1) and (5) of the Act by failing and refusing to bargain with the Union concerning changes to the Dental Plan and MEDCAP that were announced on August 28, 2006 and later implemented. (ALJD 1). DuPont filed a timely answer denying any wrongdoing.

A hearing was conducted on May 23-24, 2011 before ALJ Rosas. (ALJD 1). Testimony was presented by three DuPont witnesses and one Union witness. DuPont and Counsel for the Acting General Counsel filed post-hearing briefs and reply briefs, and the record closed with the filing of the reply briefs. On August 22, 2011, ALJ Rosas issued his decision, concluding that DuPont had violated Sections 8(a)(5) and (1) by failing to bargain upon request by the Union and

unilaterally "terminating" retirement healthcare and dental benefits for all unit employees hired after January 1, 2007. (ALJD 18:31-32, 44-46).

SUMMARY OF FACTS
(Exception Nos. 1-76)

I. THE PARTIES' BARGAINING RELATIONSHIP

As of 2006, DuPont employed more than 30,000 employees nationwide, at numerous manufacturing facilities throughout the country; approximately 4,500 of those employees are represented by labor unions. (ALJD 2:16-20; Jt. Exh. 1).[2] Certain hourly employees working at DuPont's Spruance Fibers Plant ("the Spruance Plant"), located in Ampthill, Virginia, are represented by the Union. (ALJD 2:17-21). The bargaining relationship between DuPont and the Union at the Spruance Plant dates back more than 60 years. *(Id*. 2:40-41).

II. DUPONT'S CORPORATE-WIDE EMPLOYEE BENEFIT PLANS

DuPont has maintained a single set of corporate-wide employee benefit plans, most of which have been in existence for decades, and some for more than 50 years. (*See* Resp. Exhs. 8 and 10; Anderson, 142-143). DuPont has offered all U.S. employees the opportunity to participate in its corporate-wide plans regardless of where they work, their position within the Company, or whether they are represented by a union. (ALJD 3:8-10; Anderson, 142, 145). Having a single set of benefit plans covering all DuPont employees, retirees, and survivors, totaling more than 30,000 individuals, provides significant benefits to both DuPont and individual plan participants. (Anderson, 143; Jt. Exh. 1).

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[2] Joint Exhibits will be referred to as ("Jt. Exh."), Respondent's Exhibits will be referred to as ("Resp. Exh."), and Counsel for the Acting General Counsel's exhibits will be referred to as ("GC Exh."). References to the hearing transcript will be denoted as "Tr.," and references to specific witness testimony will be denoted by the last name of the witness and page number of the transcript where the testimony appears (e.g., "Irvin, 31").

A. The Union's Agreement to Participate in the Dental Plan

DuPont created the Dental Plan in March 1976, and the Union was offered the opportunity to participate in the Dental Plan that same year. (ALJD 4:17-33). The parties discussed the various features of the Dental Plan and specifically discussed its reservation of rights provision. (ALJD 4:17-34; Resp. Exh. 3, Tab 1, pp. 2-3). The Union specifically asked if it could bargain over changes to the Dental Plan on "a local basis." (Resp. Exh. 3, Tab 1, p. 3). The Company told the Union it would not agree to bargain over changes to the Dental Plan, because it was a corporate-wide plan, but that the Union could propose an alternative plan applicable to only the Spruance site if it did not wish to participate in the Dental Plan:

> [S]ince this is a companywide benefit, we cannot agree to change this specific plan. However, if the Union wishes to substitute a different plan for this location, Management will seriously consider their proposals. (*Id.*).

As Judge Rosas correctly found, the Union, after considering its options, agreed to the Dental Plan, "subject to the Company's reservation of rights," as set forth in the Dental Plan's reservation of rights provision which stated, *inter alia*, that DuPont had "the sole right to amend or discontinue [the] Plan at its discretion." (ALJD 4:17:26). The reservation of rights language in the Dental Plan has remained virtually unchanged since it was agreed to by the Union in 1976, and has continued to reserve to the Company the right to "amend or discontinue" the Dental Plan. (ALJD 4:22-34; 5:1-2; Resp. Exh. 8, p. 8; Jt. Exh. 1E, p. 16).

B. The Union's 1986 Acceptance of MEDCAP ("Aetna Plan").

The Company created MEDCAP in 1983. (ALJD 3:14). The parties engaged in lengthy discussions of MEDCAP during meetings held in 1986. (ALJD 5:30-39; 6:1-36, 7:1-5) At that time, Union-represented employees at Spruance received health care benefits pursuant to a local Blue Cross Blue Shield Plan ("BCBS Plan") that was referenced in the Health, Surgical and

Medical ("HMS") article of the parties' contract. (ALJD 5:14-16). The BCBS Plan was not a corporate-wide benefit plan.

In February 1986, the Company provided the Union with a copy of the Summary Plan Description ("SPD") for MEDCAP, and the parties discussed the reservation of rights provision in the SPD at length. (ALJD 5:30-39, 6:1-6; Resp. Exh. 3, Tab 18, p. 8-9, 42). That provision stated, *inter alia*, "the Company reserves the right to amend any provision of the Aetna Plan[3] (for example, co-pay, 'stop-loss,' and deductible features) or terminate the Program in its entirety should either course of action be deemed necessary by the Company." (*Id*.)

In March 1986, the Union objected to MEDCAP's reservation of rights language and told the Company that it would accept MEDCAP if the reservation of rights language was deleted. (Resp. Exh. 3, tab 19, p. 3). In response, the Company informed the Union that reservation of rights language was contained in all of DuPont's corporate-wide plans, and that the Company would not make MEDCAP available to Union-represented employees without the reservation of rights language:

> Management said the Management's Rights Clause is standard language in all corporate plans. Other corporate plans such as the pension plan have the same type language. Management said they will not present a corporate plan that does not have a Management's Rights Clause. Employees do not have to choose the Aetna Plan which contains the Management's Rights Clause if they are concerned.[4]

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[3] During their initial negotiations in 1986, MEDCAP was referred to by the parties as the "Aetna Plan" because Aetna had been identified as the plan administrator for Spruance employees. Thereafter, the terms "MEDCAP" and "the Aetna Plan" were used interchangeably. (Resp. Exh. 4, tabs 1-5, 7).

[4] During bargaining, the parties typically referred to a benefit plan's reservation of rights provision as the plan's "Management's Rights Clause." (Derr, 239; Rhodes, 260).

(*Id*.) (emphasis added).[5] The parties discussed the MEDCAP reservation of rights clause at length several times thereafter, with the Union continuing to object to it, and the Company reiterating its position that the reservation of rights clause was necessary and that MEDCAP would not be offered to the Union without it. (ALJD 6:7-15; *see also* Resp. Exh. 3 tab 20, pp. 9-11, tab 21, pp. 4, 19, tab 22, p. 3).

After further discussions in September 1986, "the Union agreed to participation in the new Aetna Plan (MEDCAP), including the reservation of rights clause contained in the Plan Document." (ALJD 6:23-25) (emphasis added). The reservation of rights clause agreed to by the Union states:

> MODIFICATION OR TERMINATION OF THE PROGRAM
> The Company reserves the right to amend any provision of the Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company.

(*Id.* 6:27-29; *see also* Jt. Exh. 1C, p. 23). The reservation of rights language set forth in the MEDCAP plan document has remained unchanged. (ALJD 6:49-50).

Shortly thereafter, the parties discussed how and whether to add language to the labor contract referencing MEDCAP. At that time, the Union specifically acknowledged the Company's right to make changes to MEDCAP unilaterally, and the Union suggested that MEDCAP be placed with DuPont's other corporate-wide plans in the contract's Industrial Relations Plans and Practices ("IRP&P") provision:

> The Union said there is a need for [MEDCAP] to be placed in the Labor Agreement where people recognize Management has a right to change without Union agreement.

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[5] This critical passage, from bargaining notes that Judge Rosas credits, is ignored entirely in the Judge's decision.

(Resp. Exh. 3, tab 24, p. 4) (emphasis added). This key passage demonstrates that the Union understood, without a doubt, that it had agreed that the Company had a right to change MEDCAP unilaterally, "without Union agreement."[6]

The Company objected to MEDCAP being placed in the IRP&P provision because that provision includes a "one year notice" requirement before DuPont may implement any change that has "the effect of reducing or terminating benefits." (Resp. Exh. 3, tab 24, pp. 1, 4; Jt. Exh. 1C). Thus, if the MEDCAP Plan were listed among the corporate-wide plans identified in Section 1 of the IRP&P provision, the Company would have been precluded from making any negative changes, including restricting eligibility or increasing premiums, until the one-year notice period had passed. The Company was not willing to do so. But this very exchange demonstrates unequivocally that the Union knew, once it agreed to have its members participate in MEDCAP, that the Company had the right to make changes to MEDCAP without first bargaining to agreement or impasse.

On September 26, 1986, the parties agreed to include new, general language in the contract's HMS provision, rather than in the IRP&P provision, that made a general reference to an alternative to Blue Cross Blue Shield without specifically mentioning MEDCAP:

> The Company may make available to employees alternate hospital medical-surgical coverage plans, and any employee may elect such alternate coverage in lieu of the coverage described in the above sections of this Article XIV.

(ALJD 7:4-6, 8-10). That alternative was MEDCAP, with its reservation of rights provision.[7]

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[6] Judge Rosas failed to appreciate the significance of the Union's acknowledgement of the Company's rights as reflected in this passage.

[7] Judge Rosas' inference that omitting a specific reference to MEDCAP in the contract demonstrates that the Union successfully resisted the Company's efforts to condition

(continued…)

C. Adoption of the BeneFlex Flexible Benefits Plan

In 1991, DuPont created a new cafeteria-style benefits plan called the BeneFlex Flexible Benefits Plan ("BeneFlex"), which includes several sub-plans providing various types of benefits, including medical and dental benefits. (Anderson, 147; Irvin, 65). As it had with its other corporate benefit plans, in the early 1990s, the Company offered the Union the opportunity to have its members participate in BeneFlex. (Anderson, 147). In 1993, after considerable negotiation, the Union agreed to BeneFlex which, like MEDCAP and the Dental Plan, contained a reservation of rights provision reserving to the Company the ability to make changes without first bargaining with the Union. (ALJD 8:32:33; Jt. Exh. 1A p. 19; Jt. Exh. 1B p. 21). As a result, all active Union-represented employees at Spruance began receiving medical and dental benefits under the BeneFlex medical and dental plans. (ALJD 8:32-33). Eligible pensioners and survivors continued receiving benefits under MEDCAP and the Dental Plan. (Anderson, 147-149; *see also* Jt. Exhs. 1C p. 4 and 1E p. 4). The medical and dental benefits offered to active employees under BeneFlex largely mirror those offered to retirees under MEDCAP and the Dental Plan. (ALJD 8:35-37). Because active employees received medical and dental coverage through BeneFlex, the parties agreed to delete the Dental Plan from the contract's IRP&P provision, and agreed to delete the HMS provision in its entirety. (Resp. Exh. 3, tab 49, p. 3).

(continued…)

participation in MEDCAP on the Company retaining the right to make changes unilaterally – a theory not even advanced by Counsel for the Acting General Counsel – is plainly wrong. If the Union, in September 1986, had convinced DuPont that it should have a right to bargain over MEDCAP changes, the detailed bargaining notes would surely capture such a momentous event. The notes do not reflect such an event, and the Union advanced no evidence of such a victory.

III. DUPONT'S HISTORY OF ANNOUNCING AND IMPLEMENTING SIGNIFICANT CHANGES TO MEDCAP AND THE DENTAL PLAN

As Judge Rosas correctly noted, the Company has made more than 50 unilateral changes to the Dental Plan and/or MEDCAP since 1987, all without first bargaining to agreement or impasse. (ALJD 9:20-23). Included among those changes were modifications to participant eligibility, health care premiums, deductibles, co-pays, annual plan limits, benefit options, and other terms of coverage. (*Id.*, 9:20-23, 25-28). The evidence shows, and the Union's sole witness – Union Treasurer Donny Irvin – conceded, that DuPont made unilateral changes to MEDCAP and the Dental Plan each and every year since 1993. (Resp. Exh. 11; Irvin, 88-89). Many, if not most, of the Company's unilateral modifications to MEDCAP and the Dental Plan were significant and disadvantageous to benefit plan participants, including Union members, as they "tended to reduce or restrict benefits." (ALJD 9:33-34).

The Union has been fully aware of the unilateral changes made to DuPont's MEDCAP and Dental Plans, both positive and negative. Although many of the changes the Company made to MEDCAP and the Dental Plan were detrimental to Union members' interests, the Union did not file a single grievance or unfair labor practice charge challenging the Company's right to change MEDCAP and/or the Dental Plan unilaterally at any time during the more than two decades leading up to the 2006 benefit plan changes at issue in this case. (ALJD 10:36-37).

IV. 2006 CHANGES TO MEDCAP AND THE DENTAL PLAN

On August 28, 2006, the Company announced that it planned to modify seven of its corporate-wide benefit plans, including MEDCAP and the Dental Plan. (Jt. Exh. 1, ¶ 23). Specifically, DuPont announced that it would amend the eligibility provisions of MEDCAP and the Dental Plan to reflect that any DuPont employee hired on or after January 1, 2007 would not be eligible to participate in either of these two retiree benefit plans; existing pensioners and pre-

2007 hires who later satisfy the age and years of service requirements would continue to participate in MEDCAP and the Dental Plan. (Jt. Exh. 1, ¶¶ 17-18). DuPont implemented the announced plan modifications as to MEDCAP and the Dental Plan on December 20, 2006. (ALJD 11:25-26).

On August 28, 2006, the Company's Labor Relations Manager met with the Union and, consistent with the Company's handling of prior benefit plan changes, informed the Union of the upcoming benefit plan changes and explained the changes. (ALJD 10:37-38; 11:1-3). On November 7, 2006, the Union filed a grievance challenging the Company's right to modify any of the seven benefit plans at issue, including MEDCAP and the Dental Plan. (ALJD 11:21-22). Months later, in February 2007, the Union filed an unfair labor practice charge, alleging that the Company had violated its duty to bargain by announcing and implementing the benefit plan changes at issue here. (GC Exh. 1(a)).

ARGUMENT

I. THE ALJ ERRED BY FAILING TO FIND AN EXPRESS WAIVER OF THE UNION'S RIGHT TO BARGAIN OVER CHANGES TO MEDCAP AND THE DENTAL PLAN

Judge Rosas erred by concluding that the evidence failed "to reveal the existence of an express waiver by the Union." (ALJD 14:1-3). As the ALJ noted, "there is very little dispute as to the relevant facts," and the ALJ fully credited the testimony of each of the Company's witnesses, as well as the accuracy of the description of the facts and circumstances of events set forth in the Company's bargaining notes. (ALJD 1, n.1., 2:51; 3:30-34, 38-41). As explained below, however, the ALJ ignored additional, compelling, and undisputed evidence that undermines his ultimate holding.

The Board considers four factors to determine whether a clear and unmistakable waiver exists: (1) language in the collective bargaining agreement, (2) the parties' past dealings, (3)

relevant bargaining history, and (4) other "bi-lateral [agreements] that might shed light on the parties' intent." (ALJD 12:29-33, citing *Johnson-Bateman,* 295 NLRB 184, 187 (1989), and *American Diamond Tool*, 306 NLRB 570 (1992)). While the Union's express waiver is not found in the parties' collective bargaining agreement – as neither MEDCAP nor the Dental Plan is referenced in that contract – the record is replete with powerful evidence establishing an express waiver based on the remaining three factors.

A. The Parties Fully Discussed and Consciously Explored the Meaning of the Reservation of Rights Provisions Before the Union Agreed to Them (Exception Nos. 2-5, 24-35, 40)

As the ALJ correctly notes, "waiver of a statutory right may be evidenced by bargaining history" where "the matter at issue has been 'fully discussed' and 'consciously explored' during negotiations" and there is evidence that a party consciously waived its interest in the matter. (ALJD 13:17-21). The record contains abundant, undisputed evidence satisfying that standard.

1. The Parties Specifically Discussed, and the Union Agreed to, the Reservation of Rights Provision Contained in the Dental Plan

The bargaining history demonstrates that the Company agreed to permit Union employees to participate in the Dental Plan only on the condition that the Company would retain the right to make changes to the plan in its discretion without bargaining. During a meeting on March 31, 1976, the Company offered the Union the opportunity to have its members participate in the Dental Plan. (Resp. Exh. 3, tab 1, p. 1). In that meeting, the Company described the Dental Plan in detail, responded to Union questions, and discussed the plan's benefits in depth. (*Id.*, pp. 1-2). The parties also specifically discussed the Company's right to make changes unilaterally to the Dental Plan if the Union accepted the plan. (*Id.*, p. 2). The Company informed the Union that the Dental Plan would contain a reservation of rights provision stating:

> **The Company reserves the right to change or discontinue the Plan.** Any change which might reduce or terminate a basic feature of the Plan

> will not be effective until one year following such announcement. **The Company reserves the right to make general and specific revisions in the benefit schedules of allowances in effect at any or all locations**. Such schedule revisions will not be construed as a deliberalization (reduction, termination or withdrawal of benefits) . . . . (*Id.*, p. 2) (emphasis added).

Seeking additional clarification, the Union asked if it could bargain over the Dental Plan on "a local basis." (*Id.*) The Company responded, "since this is a companywide benefit, we cannot agree to change this specific plan. However, if the Union wishes to substitute a different plan for this location, Management will seriously consider their proposals." (*Id.*).

With that clear understanding, the Union accepted the terms of the Dental Plan just two weeks later, on April 13, 1976. (Resp. Exh. 3, tab 2, p. 1). Indeed, as Judge Rosas's Decision correctly states: "the parties bargained over member participation in DAP [the Dental Plan]," and "[e]mployee participation in DAP . . . was subject to the Company's reservation of rights" clause in the Dental Plan. (ALJD 4 17-20) (emphasis added).

There is no record evidence to suggest that the Union failed to understand the meaning or effect of the reservation of rights language to which it agreed in 1976. To the contrary, the undisputed record shows that the Union understood fully that its waiver of the right to bargain over changes to the Dental Plan was the "price of admission" for its members' participation in the plan.

The negotiations regarding how the parties memorialized the Union's acceptance of the Dental Plan confirms the Union's waiver. The Company proposed three options for memorializing the parties' agreement with respect to the Dental Plan:

> 1. Include in the "Industrial Relations Plans and Practices" Article of the Agreements – this method is preferred by Management since DAP is a company-wide benefit plan as are others in this Article, or

2. Provide words in a separate Article of the contract that state the Dental Assistance Plan is incorporated as part of this Agreement, or

3. Let the Dental Assistance Plan speak for itself without any reference to it in the Labor Agreement.

(Resp. Exh. 3, tab 1, p. 3) (emphasis added). The Company made it clear, before the Union accepted the Dental Plan, that the "Dental Assistance Plan language," most particularly the reservation of rights provision, would be the "governing factor for administration of the [Dental] benefit" irrespective of which of the three options the parties elected. (*Id*.).

As Judge Rosas correctly notes, the parties ultimately agreed to list the Dental Plan, along with DuPont's other corporate-wide plans, in the contract's IRP&P provision. (ALJD 4:18-19). That IRP&P provision specifically confirms that DuPont had the right to make unilateral changes to the Dental Plan, consistent with the *quid pro quo* that formed the basis for Union members' participation in the plan:

> All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY and of the Plant shall continue, **subject to the provisions of such Plans** and Practices and to such rules, regulations and interpretations as existed prior to the signing of this Agreement, **and to such modifications thereof, as may be hereinafter adopted generally** by the Company or the Plant to govern such privileges, **provided, however, that as long as any one of these COMPANY Plans and Practices is in effect at any other Plant within the COMPANY it shall not be withdrawn from employees covered by this Agreement**, and **provided, further that any change in these Plans and Practices which has the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the Union by the Company of such change**.
>
> Dental Assistance Plan* (Resp. Exhs. 5(a) pp. 13-14, 5(b) pp. 16-17).

The parties agreed to include an asterisked annotation as part of the IRP&P provision with respect to the Dental Plan, which made it clear not only that the Company had the right to change the Dental Plan, but that any changes to the "schedule of allowances" in the Dental Plan

could not be construed as "a reduction, termination or withdrawal of benefits" triggering the IRP&P provision's one-year notice requirement:

> *The Dental Assistance Plan, effective September 1, 1976, has a schedule of allowances applicable to employees covered by this Agreement which are subject to revision solely by the COMPANY and without reference to such a schedule in effect for any other employees, and any such revision of schedules shall not be construed as a reduction, termination or withdrawal of benefits. (Resp. Exhs. 5(a) p. 14, 5(b) p. 17).

Both the Board and labor arbitrators have held that DuPont retains the right, without bargaining, to make changes to the benefit plans listed in the IRP&P provision during the term of the labor contract containing that provision. *See, e.g., E. I. DuPont de Nemours (Louisville Works)*, 355 NLRB No. 176 (2010) and *E.I. DuPont de Nemours*, 355 NLRB No. 177 (2010); see *also* Resp. Exh. 12, *E.I. DuPont de Nemours & Co. and Ampthill Rayon Workers, Inc.,* AAA Case No. 14 300 002012 06 CNN, Grievance No. S-1-06 (Arb. Jaffe 2010) (finding that DuPont had the right to modify unilaterally the corporate-wide benefit plans listed in the IRP&P provision of the Spruance CBAs); *Int'l Chemical Workers Union Local 527c and E.I. DuPont de Nemours & Co.*, FCMS No. 10-56205-1 (Arb. Zuckerman 2011) (attached hereto as Exhibit A).

Consistent with the parties' agreement as reflected in both the Dental Plan's reservation of rights provision and the IRP&P provision, the Company made several unilateral changes to the Dental Plan during the period 1976 – 1995. (*See* Resp. Exh. 11). After the Union's agreement to BeneFlex resulted in the parties deleting the contractual reference to the Dental Plan in 1995, the Company continued to make unilateral changes to the Dental Plan, all the way from 1995 until 2006.

There is no evidence to suggest that the Union's agreement to BeneFlex altered the long-standing *quid pro quo* regarding the Union members' participation in the Dental Plan. Union members continued to participate in the Dental Plan and receive retiree dental benefits when they

became pensioners under DuPont's Pension Plan, and the Company continued to retain, and exercise, the authority to change the Dental Plan unilaterally without first bargaining with the Union.

2. The Parties Negotiated at Length Before the Union Agreed to MEDCAP's Reservation of Rights Provision

While Judge Rosas acknowledges that the MEDCAP reservation of rights provision "was discussed at length," his decision fails to acknowledge two critical, uncontested facts that demonstrate the existence of the Union's express waiver: (1) throughout the parties' negotiation of the Union's participation in MEDCAP, the Company made it abundantly clear that because MEDCAP was a Company-wide plan, it would not allow Union members to participate in MEDCAP without the Union's agreement to the proposed reservation of rights provision; and (2) despite repeatedly objecting to the inclusion of the reservation of rights provision in MEDCAP, the Union ultimately relented and agreed to the MEDCAP reservation of rights provision as the *quid pro quo* for its members' participation.

Contrary to the Judge's conclusion, the history of the parties' negotiations concerning the Union's participation in MEDCAP, most of which the Judge specifically credits, demonstrates the Union's clear and unmistakable waiver. As Judge Rosas found, in February 1986, the Company made a formal proposal to the Union that would allow Union members to participate in MEDCAP. (ALJD 5:30-31). Included in the Company's MEDCAP proposal was a reservation of rights clause (often referred to as a "management rights clause" by the parties) which reserved to the Company the right to amend any provision of the plan unilaterally. (*Id*., 5:30-35).

During a meeting on March 4, 1986, the Union raised concerns about the reservation of rights language and told the Company that it would accept MEDCAP if the reservation of rights

language was deleted. (Resp. Exh. 3, tab 19, p. 3). The ALJ's decision fails to even mention the Company's unequivocal and critically important response to the Union's proposal: the Company rejected the Union's proposal, telling the Union that reservation of rights language was contained in all of DuPont's corporate-wide plans, and that the Company would not make MEDCAP available to Union-represented employees without the reservation of rights language:

> Management said the Management's Rights Clause is standard language in all corporate plans. Other corporate plans such as the pension plan have the same type language. Management said they will not present a corporate plan that does not have a Management's Rights Clause.[8] Employees do not have to choose the Aetna [MEDCAP] Plan which contains the Management's Rights Clause if they are concerned.[9]

(*Id*.) (emphasis added). By so stating, the Company made it crystal clear that the Union's agreement to the reservation of rights clause, allowing the Company to make changes to MEDCAP unilaterally, was the *quid pro quo* for Union members' participation in the plan.

As the ALJ correctly found, the parties continued to discuss the MEDCAP reservation of rights clause at length over the course of multiple meetings after this key exchange, with the Union continuing to object to the clause. (ALJD 5:36-39, 6:1-15). Despite the Union's objection, the Company continued to insist that the reservation of rights provision was necessary, and that it would not offer MEDCAP to Union employees without the Company retaining the right to modify the Plan unilaterally:

> [DuPont] believe[s] it is necessary to have this language in the Aetna Plan. Management said it is necessary to be able to maintain the plan on an ongoing basis; therefore they need the clause. (Resp. Exh. 3 tab 20, p. 10).

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[8] During bargaining, the parties typically referred to a benefit plan's reservation of rights provision as the plan's "Management's Rights Clause." (Derr, 239; Rhodes, 260).

[9] The Company was offering MEDCAP as a second option to – rather than as a replacement of – the existing local BCBS Plan. Accordingly, at the time, employees could elect to continue to participate in the local BCBS Plan, rather than MEDCAP, if they were concerned about the reservation of rights clause and DuPont's right to make changes unilaterally.

As Judge Rosas noted, the Union asked why the reservation of rights language was necessary for MEDCAP, when such language was not contained in the existing BCBS medical plan. (ALJD 5:38-39, 6:1; *see also* Resp. Exh. 3 tab 20, p. 10). The Company explained the material difference between the two medical plans – the BCBS plan was "a local plan" subject to local bargaining, whereas MEDCAP is "a corporate Plan" covering employees nationwide. (ALJD 6:1-2; *see also* Resp. Exh. 3, tab 20 pp. 10-11).

As Judge Rosas specifically recognized, in September 1986, after much discussion, "the Union agreed to participation in the new Aetna plan (MEDCAP), including the reservation of rights clause contained in the plan," which stated:

> The Company reserves the right to amend any provision of the Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company.

(ALJD 6:23-29) (emphasis added). Thus, from the outset, the Company insisted that the reservation of rights provision be included in MEDCAP, and that the Company would not offer MEDCAP without that right because the Plan was a corporate-wide plan. There is no evidence that the Company ever wavered from that position.[10]

The record demonstrates unequivocally that the Union *did* change *its* bargaining position. Although the Union had repeatedly objected to the inclusion of the reservation of rights language in MEDCAP, which created "the stumbling block to an agreement" with respect to MEDCAP for several months, the Union ultimately and consciously yielded on the matter.

Moreover, the parties' discussions regarding MEDCAP and the Union's waiver of the right to bargain over changes to the plan are perfectly logical when examined in context. As the

[10] Indeed, Judge Rosas failed to square his finding above with his ultimate legal conclusion that no clear waiver exists.

record makes clear, the Union agreed to MEDCAP as a supplement or alternative to the local BCBS plan that was already in place. As the Company made clear during bargaining, if Union-represented employees did not wish to participate in MEDCAP due to the Company's right to make changes, then those employees could simply elect coverage under the BCBS plan:

> [T]he Management's Rights Clause is standard language in all corporate plans. Other corporate plans such as the pension plan have the same type language. Management said they will not present a corporate plan that does not have a Management's Rights Clause. Employees do not have to choose the Aetna Plan which contains the Management's Rights Clause if they are concerned. (Resp. Exh. 3, tab 19, p. 3).

Simply put, the Judge's conclusion that there was insufficient evidence to show that the Union consciously intended to relinquish its right to bargain over MEDCAP changes cannot be reconciled with the undisputed record evidence and nearly all of the Judge's factual findings.

3. The Parties' Discussions Regarding the Contractual Reference to MEDCAP Confirms the Union's Waiver

Judge Rosas cited to the parties' discussions concerning whether and how to reference MEDCAP in their collective bargaining agreement as evidence of a lack of agreement regarding the existence or scope of the Union's waiver.[11] Without any citation to the record, Judge Rosas stated:

> [I]t is far from clear that that there was a meeting of the minds as to what the removal of the management-rights clause from the pertinent part of the contract meant. While the Company contends that the provision was excluded from the contract because it did not want to be bound by the 1-year layover provision in Article VII, the bargaining notes do not reveal the Union to have been operating under the same pretenses.

(ALJD 13:45-50). The Judge clearly misread the record and failed to understand the parties' discussions in context.

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[11] Neither Counsel for the Acting General Counsel nor the Union advanced this theory at hearing or in briefs to the ALJ.

As an initial matter, the parties never agreed to "remove" any "management rights clause" or reservation of rights clause from any contract. It appears that the Judge is referring to the parties' initial discussions in 1986 regarding whether, how, and where to refer to MEDCAP in the parties' collective bargaining agreement – discussions that occurred after the Union had agreed to participate in MEDCAP. The bargaining history regarding the contractual treatment of MEDCAP is fully consistent with, and in fact confirms, the Union's express waiver.

As the record makes abundantly clear, MEDCAP was offered as alternative medical coverage to the local BCBS plan that was identified in the HMS article of the parties' contract. On September 15, 1986, the parties discussed how or whether the alternative Aetna Plan (MEDCAP) should be addressed in the contract. The parties revisited the issue a week later during a meeting conducted on September 23, 1986. Those discussions are reflected in the following passages:

> The Union said that it does not want the Aetna Plan mentioned in the contract at all, and asked what the Company's position is on that. Management said if it is offering an option to Blue Cross Blue Shield, then it needs in some way to be referred to that option. It may use words like "the basic Blue Cross-Blue Shield or any other plan management may choose to offer." Management said it is not committed to listing Aetna as such. There is a way not to mention Aetna by name. **The Union asked if the alternative insurance plan could be mentioned under the Industrial Relations Plans and Practices with a footnote like the Dental Plan. The logic for that being it contains a Management's Rights Clause in it, and could be listed along with all of the other plans of which the Company has control.**
>
> * * *
>
> Article VII, Industrial Relations Plans and Practices.
>
> Management said the Union's earlier request was to move the HMS reference to Aetna Plan to this Article [the IRP&P provision] in the Labor Agreement and footnote similar to the Dental Assistance Plan. This is the second choice. The first choice is not to reference the Aetna Plan at all. Management said it was not appropriate to put in the IRP's. . . . . since

> HMS changes need to be made to respond to changing local conditions, Management believes it is inappropriate to place where one-year restrictions would present a bar. Management said it is willing to reference this by a general statement in the HMS section or leave it as it is.

(Resp. Exh. 3 tab 23 p. 2 and tab 24, p. 1).

As the bargaining notes demonstrate, the Union suggested that if MEDCAP was to be specifically referenced in the contract, it should be listed under the IRP&P provision along with the other corporate wide benefits plan over which "the Company has control." *Id.* And, as Judge Rosas found, the Company rejected the Union's suggestion to include MEDCAP in the IRP&P provision with the other company-wide plans because the IRP&P provision contains a 1-year notice restriction that would have presented a bar to the Company's ability to make necessary changes to medical coverage on a timely basis. (ALJD 6:35-37; 7:1-2). As noted above, the IRP&P provision states:

> [A]ny change in these Plans and Practices which has the effect of reducing or terminating benefits will not be made effective until one (1) year after notice to the Union by the Company of such change. (Jt. Exhs. 1(a) p. 18 and 1(b) p. 20).

In short, the Company anticipated the need to make changes to MEDCAP on a more expedited basis than would have been contractually possible had the Company agreed to list MEDCAP in the IRP&P provision. The Company's concerns proved prescient, as the record conclusively shows that the Company made changes to MEDCAP virtually every year during the period 1993-2006, typically announcing the changes in August or September and implementing them less than year later, in January. (*See, e.g.,* Resp. Exh. 11). Judge Rosas correctly acknowledged that the reservation of rights language never changed over the decades that passed after the Union agreed to MEDCAP and the Union conceded that unilateral changes were made

year after year, following this bargaining over how MEDCAP would be referenced, or not, in the contract.

Thus, the parties' negotiations over whether, how, and where to refer to MEDCAP in the contract confirms the Union's express waiver. Simply put, there would have been no logical reason for the Company to object to the 1-year notice restriction, unless the Company retained the right to modify the Plan in the first place.[12]

B. The Language Set Forth in the Agreed-Upon Reservation of Rights Provision Constitutes a Clear and Unmistakable Waiver (Exception Nos. 2-5, 24-35, 40)

As the Board has long held, a waiver will be found if it is expressed in clear and unmistakable terms. *American Broadcasting Co.*, 320 NLRB 86, 88 (1988) (a union can be found to have "relinquish[ed] a statutory bargaining right if the relinquishment is expressed in clear and unmistakable terms"). As demonstrated above, the Union agreed to the reservation of rights language in MEDCAP and the Dental Plan. Accordingly, the only remaining question is whether the agreed-upon reservation of rights language grants the Company the right to act unilaterally in clear and unmistakable terms.

The reservation of rights provision in the Dental Plan, which has remained essentially unchanged since the Union agreed to it in 1976, states:

> RIGHT TO MODIFY PLAN AND BENEFIT SCHEDULES
>
> A. The Company reserves the sole right to amend or discontinue this Plan at its discretion by action of the Executive Committee. Any change which has the effect of reducing or terminating benefits hereunder will not be effective until one year following announcement of such change by the Company.

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[12] The Company had the same concern regarding the 1-year notice limitation with respect to BeneFlex about a decade later, and the parties addressed that concern by creating a new section within the IRP&P Article that did not contain the 1-year notice requirement. (*See* Resp. Exhs. 7(a) p. 18 and 7(b) p. 18).

> B. The Company also reserves the sole right at any time and without notice to make general and specific revisions in the benefit schedules in effect at any or all employment locations and any such revision of schedules shall not be construed as a reduction, termination or withdrawal of benefits. The designated benefit schedule at any one employment location shall in no way be dependent on or subject to changes because of the designated benefit schedule, or changes in the designated benefit schedule, at any other employment location. (Jt. Exh. 1C p. 16).

The reservation of rights language contained in MEDCAP states:

> MODIFICATION OR TERMINATION OF THE PROGRAM
>
> The Company reserves the right to amend any provision of the Program or terminate the Program in its entirety should either course of action be deemed necessary by the Company. (Jt. Exh. 1E p. 23).

There is nothing remotely unclear or ambiguous about the reservation of rights language in either of the relevant plans. Indeed, courts have held that employers should use these very terms to put benefit plan participants on notice that their employer has retained the right to modify the benefit Plans at issue. (*See, e.g., Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994) (retiree health care plan language stating the "Policy may be amended or discontinued at any time" put employees on notice that employer had the unilateral right to modify or terminate the plan and continued benefits were neither guaranteed nor vested); *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (language stating "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet" was unambiguous)). Accordingly, the Union has expressly waived its right to bargain by negotiating over and agreeing to the reservation of rights language contained in both benefit plans.[13]

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[13] In addition, the Judge's decision should be reversed and the Complaint dismissed pursuant to the "contract coverage" analysis. As several courts have explained, "[w]hen a union agrees to a management rights clause that gives the employer the exclusive right to [act on a matter], no further bargaining on the issue is required by the NLRA." *Local 15, IBEW v. Exelon*

(continued…)

C. Judge Rosas Erred By Concluding that the Company's Assertions to the Union Estop it from Making the 2006 Changes (Exception Nos. 50-56, 68, 72)

Judge Rosas concludes that the Company's bargaining notes "indicate that the Company had no intention of terminating the retiree benefit plans, thus causing employees to rely on the Company's representations to their detriment." (ALJD 16:48;-17:1-2). He further concludes that "the Company's assertions, past practices, and manifestations to the Union estop it from unilaterally terminating MEDCAP/DAP without providing an alternative coverage plan." (ALJD 16:46-48). The Judge's conclusions – drawn solely from his own beliefs and not from arguments advanced by Counsel for the Acting General Counsel or the Union – lack record support and are clearly erroneous for many reasons.

First, the Company did not terminate either MEDCAP or the Dental Plan as Judge Rosas repeatedly and mistakenly suggests. (ALJD 17:1) (concluding "terminating the entire retiree healthcare and dental program far exceeds the expectations of the parties"). DuPont simply modified the plans' eligibility requirements, making clear that new hires (those hired after January 1, 2007) would not be eligible for future retiree benefits. MEDCAP and the Dental Plan still exist and continue to provide medical and dental benefits to DuPont pensioners who retired

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(continued…)

Corp., 495 F.3d 779, 783 (7th Cir. 2007), citing *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992). *See also NLRB v. United Postal Service,* 8 F.3d 832, 836 (D.C. Cir. 1993) (holding that a union may exercise its right to bargain about a particular subject by negotiating over a contract provision that "fixes the parties' rights and forecloses further mandatory bargaining as to that subject"). Here, the parties' bilateral agreement as to future bargaining over changes to MEDCAP and the Dental Plan is reflected in the reservation of rights provisions contained in the MEDCAP and Dental Plan documents, which formed the contract between the parties as to that issue. As the D.C. Circuit made clear, "neither the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement." *United States Postal Service,* 8 F.3d at 836.

at any time over the last several decades. In addition, all active DuPont employees hired prior to 2007 may be eligible to receive benefits under MEDCAP and the Dental Plan if they otherwise meet the Plans' eligibility requirements.[14]

Second, ALJ Rosas misconstrued the record in concluding that the Company made binding representations that employees relied on "to their eventual detriment." (ALJD 17:2). That conclusion is apparently based on a selective parsing of bargaining notes from a single Union-Management meeting on June 11, 1987 – almost a year after the Union had already accepted MEDCAP and agreed to its reservation of rights clause. During that meeting, the Union asked whether pensioners were guaranteed a medical plan when they retire. At that time, the Company told the Union what retiree medical benefits were then available to pensioners, but specifically and clearly disclaimed any guarantee of future benefits, telling the Union that the Company "has reserved the right to change and modify or discontinue the plan if needed." (ALJD 17:4-8). The Company's statement was fully consistent with the MEDCAP reservation of rights provision to which the Union had agreed less than a year earlier, and drew no objection from the Union.

The Judge's conclusion – that DuPont created in employees some expectation or guarantee of future retiree benefits – is based on the following Company comment made during that same June 11, 1987 meeting: "there has been no plan to discontinue medical coverage for

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[14] Not all employees who retired from DuPont were eligible for retiree medical and dental benefits even prior to the 2006 plan amendments at issue here. Rather, retirees were required to satisfy the eligibility criteria specifically set forth in the plans. And, as part of that eligibility criteria, even prior to the 2006 changes, retirees were required to retire under DuPont's Pension Plan, becoming "pensioners," before they would be eligible for retiree medical and dental benefits under MEDCAP and the Dental Plan. To retire under the Pension Plan and become a "pensioner," a retiree must have worked for DuPont for a minimum of 15 years and satisfy the age requirements set forth in the Pension Plan.

pensioners and [management] does not visualize that ever happening. . . The plan may be changed or, or [sic] the pensioner may be covered by a different plan."[15] (ALJD 17:8-10) (emphasis added). That statement, made more than two decades ago, is clearly insufficient to create an expectation of guaranteed or vested retiree medical benefits, particularly given the Company's specific reminder to the Union, in the very same discussion, that it had reserved the right to change, modify or terminate MEDCAP. Indeed, numerous courts have concluded that oral representations akin to those cited by Judge Rosas do not negate reservation of rights language of the type agreed to by the Union here. *Sprague*, 133 F.3d at 401 (6th Cir. 1998) (employer retained right to change retiree benefits based on clear language set forth in written plan documents despite multiple statements that "General Motors believes wholeheartedly in this Insurance Program for GM men and women, and expects to continue the Program indefinitely"); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Lit.*, 58 F.3d 896 (3d Cir. 1995) ("Due to the unambiguous reservation of rights clauses in the summary plan descriptions by which Unisys could terminate its retiree medical benefit plans, … retirees cannot establish 'reasonable' detrimental reliance" based on statements that the company expected to continue the plans).

Third, the Judge's assumption that employees relied "to their eventual detriment" on the Company representations referenced in the July 11, 1987 bargaining notes does not withstand scrutiny. As an initial matter, the Judge failed to cite to any record evidence to suggest that Union employees relied on the referenced comments to their detriment. The reason for this

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[15] There is no evidence that the Company, in 1987, had any plan to discontinue medical coverage for pensioners. And indeed, the Company continued to offer MEDCAP to all existing and future pensioners for almost 20 years following the June 11, 1987 meeting. In addition, the Company continues to provide medical coverage under MEDCAP to all eligible "pensioners." All employees hired prior to January 1, 2007 remain eligible for retiree medical coverage under MEDCAP upon becoming a "pensioner" under the terms of DuPont's Pension Plan.

omission is clear. There is no evidence of detrimental reliance because it does not, and could not, exist. The 2006 MEDCAP change at issue only affected "new hires" – those employees hired almost 20 years after the July 11, 1987 meeting. By definition, such employees could not have relied on any representations made by the Company 20 years earlier. Bargaining unit members employed at Spruance at the time the Company's comment was made in 1987, and those hired for almost 20 years thereafter, where not impacted by the 2006 MEDCAP changes. Nor is there any evidence of detrimental reliance by the Union. And there could not be, as the Union, after considerable debate, had agreed to the MEDCAP reservation or rights provision less than a year earlier, as the *quid pro quo* for its members' participation in the plan.

Fourth, the Judge's conclusion that the Company should be estopped from unilaterally terminating MEDCAP/DAP because it did not offer "an alternative coverage plan" is puzzling to say the least. Inherent in that conclusion, which is referenced several places in the Judge's opinion, is an assumption that the Company would have had the right to modify MEDCAP and the Dental Plan if it had only offered some alternative coverage with unknown attributes. There is nothing in the agreed-upon reservation of rights language, the history of the parties' dealings, or otherwise to support the notion that the Company retained the right to modify the plans without bargaining so long as it offers some alternative. The Judge's conclusion – again, based on a theory that neither Counsel for the Acting General Counsel nor the Union advanced – is simply pulled out of thin air.

D. The Consistent Past Practice of Unilateral Changes to MEDCAP and the Dental Plan Confirms the Union's Waiver (Exception Nos. 14-18, 27, 57-67)

Any conceivable doubt concerning the Union's express waiver is eliminated upon review of the Company's decades-long past practice of making unilateral changes to MEDCAP and the Dental Plan. The undisputed evidence shows, and Judge Rosas found, that the Company

implemented changes to MEDCAP and the Dental Plan each and every year since 1987, and announced more than 50 unilateral changes to health care premiums, deductibles, co-pays and annual plan limits, benefit options, terms of coverage, and participant eligibility during that 20-year period. (ALJD 9:19-22). The Judge further noted, correctly, that most of "the Company's unilateral changes tended to reduce or restrict benefits." (ALJD 9:33-34). For example, the undisputed record shows that the Company announced and unilaterally implemented the following significant changes:

- Changed eligibility requirements for dependents under the Dental Assistance Plan and MEDCAP in 2004 so that dependent children age 19 and older could not receive benefits unless they were full-time students or certified as disabled.

- Increased the cost of employee medical premiums under MEDCAP in 1987, 1995, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004.

- Reduced coverage from 100% to 80% for outpatient diagnostic and lab services, home health and hospice care, birthing centers, and outpatient hospital and emergency room charges in 1994.

- Changed MEDCAP so that employees who retired after 1994 with a reduced pension (because they retire early -- at 50 rather than 58) will have reduced company contributions to their health care premium.

- Changed eligibility rules for working spouses, requiring a working spouse to enroll in and be covered by working spouses' medical plan unless actual cost of coverage was more than $35 in 1994. The Company has steadily increased that amount from $35 to $100 during the period 1994 through 2002.

- Announced caps on Company-paid retiree medical and prescription expenses under MEDCAP in 2002; cap was $4,000 for Medicare eligible retirees and $9,000 for pre-Medicare retires.

(Resp. Exh. 11, Tabs 1, 7, 8, 10, 12, 13, 14, 18, 19, 22, 23, 24, 26, 28, 30, 33, 34, 37, 38, 41, 43, 44, 46). All of the above-mentioned changes had an obvious, significant and detrimental impact on Union members' future retirement benefits.

The evidence also shows that the dealings between the parties with respect to MEDCAP and the Dental Plan "were not affected in any noticeable manner" after active Union employees began receiving medical and dental benefits under the BeneFlex plan, and after the reference to the Dental Plan was removed from the parties' contract. (ALJD 9:24-25; *see also* Irvin, 69-70). As it had done previously, "the Company continued making changes to MEDCAP and DAP," which included "changes to premiums, co-pays, and deductible for retirees, and eligibility criteria under MEDCAP and DAP." (ALJD 9:24-28).

Despite the numerous negative, unilateral changes imposed by the Company, the record shows, and the ALJ acknowledged: "At no time prior to 2006 did the Union ever file a grievance or unfair labor practice [charge] regarding any of the MEDCAP or DAP changes." (ALJD 10:36-37). The Judge cites to no rational reason for the Union's failure to object to the multitude of prior changes. If the Union truly believed that DuPont had no right to make unilateral changes to MEDCAP or the Dental Plan, as it now contends, it could have simply filed a grievance or unfair labor practice charge as it did here, seeking to prevent DuPont from unilaterally imposing adverse changes upon its members. The Union's failure to do so is fully consistent with, and reflects the fact that, the Union realized it had waived its right to bargain over MEDCAP and the Dental Plan changes decades ago when it agreed to participate in the plans subject to their reservation of rights provisions. *California Pacific Med. Ctr.*, 337 NLRB 910, 914 (2002) ("it is unlikely that in each and every past . . . situation the Union would have elected not to assert a right to engage in decision bargaining if it believed it had the right"); *Litton Microwave Cooking Products*, 868 F.2d at 858 (history and practices of the parties reveals that the union believed management could unilaterally exercise its rights, given the absence of union challenges or requests to bargain in the past); *Uforma/Shelby Business Forms* v. *NLRB*,

111 F.3d 1284, 1291 (6th Cir. 1997) (previous acquiescence suggests that the union acknowledged the right of the employer to act without notice or bargaining).

E. Judge Rosas Misapplied Board Law by Failing to Find an Express Waiver (Exception Nos. 27-34)

The Judge credited the Company's bargaining notes, the key witness testimony, and other evidence that DuPont proffered in demonstrating the Union's express waiver, yet failed to draw the correct legal conclusion. Relying on *Southern Nuclear Operating Co*. 348 NLRB 1344 (2006), *enf'd in part denied in part,* 524 F.3d 1230 (D.C. Cir. 2008) and *Mississippi Power Co*. 332 NLRB 530 (2000), *enf'd in part,* 284 F.2d 605 (5th Cir. 2002), he concluded that the evidence fell short of satisfying the Board's clear and unmistakable waiver standard. Both of those cases are inapposite.

In *Southern Nuclear,* the employer unilaterally changed certain retiree medical benefits without first bargaining with the relevant unions. The Board and later the court found that the reservation of rights provision contained in the applicable plan documents and summary plan descriptions (SPDs) did not give the Company the right to change retiree benefits unilaterally because there was no evidence that the plans or SPDs were incorporated into the parties' collective bargaining agreement. The penultimate question in *Southern Nuclear*, as the ALJ there put it, was "did the parties have a meeting of the minds on what would happen if the employer ever changed the benefits plans." 348 NLRB at 1354. To answer that question, the decision in *Southern Nuclear* focused on whether the parties intended to incorporate the benefit plan at issue into the parties' labor agreement, thereby incorporating the plan's reservation of rights provision into the parties' agreement, albeit indirectly. There was no evidence that the parties in *Southern Nuclear* "consciously explored" the relevant reservation of rights language.

Similarly, in *Mississippi Power* the employer was charged with unlawfully announcing and implementing changes to future retiree benefits. The employer there claimed that the unions waived their right to bargain over changes to retiree medical benefits based on the reservation of rights language set forth in the medical plan providing the documents. The Board rejected the employer's argument, noting that the benefit plan at issue was an employer-created document that did not reflect the union's agreement to waive bargaining over future retirement benefits of active workers. 332 NLRB at 531. As in *Southern Nuclear*, there was no evidence in *Mississippi Power* that the parties "consciously explored," much less negotiated at length over, the reservation of rights language.

Southern Nuclear and *Mississippi Power* are clearly distinguishable because here the reservation of rights language at issue does reflect the Union's waiver, even though it is contained in plan documents that were created by DuPont. As the evidence makes clear, the Company demanded, during bargaining, that the Union agree to the reservation of rights language in exchange for Union member's participation in the benefit plans. And – in stark contrast to the facts of *Southern Nuclear* and *Mississippi Power* – the reservation of rights language was discussed at length here. If the Union did not wish to agree to the language, it could have elected not to have its members participate in the plans. Instead, the Union ultimately agreed to have its members participate in the plans, and specifically agreed to the reservation of rights language in both plans as the price of admission. To now require the Company to continue to allow Union members to participate in MEDCAP and the Dental Plan, while at the same time stripping the Company of the ability to act under the reservation of rights provision in those plans, would deprive the Company of the benefit of the bargain it negotiated along ago and would confer a windfall upon the Union.

II. JUDGE ROSAS' FINDING THAT THE PARTIES BARGAINED OVER PAST CHANGES TO MEDCAP AND THE DENTAL PLAN IS UNSUPPORTED BY THE RECORD AND PLAINLY ERRONEOUS

At various points in his decision, ALJ Rosas notes that DuPont has some "history of bargaining" over prior changes to MEDCAP and/or the Dental Plan,[16] and relies on that finding to conclude that the Union had not waived its right to bargain through past practice or consistent acquiescence. (S*ee e.g.,* ALJD 15:1-4). Yet, in other places in his decision, the Judge acknowledges that "the Company established a history of unilateral changes to health benefits" and had a "history of imposing unilateral changes to the terms of coverage" under MEDCAP and the Dental Plan. (16:25-26; 17:18-19). Despite the Judge's inconsistent findings, the record could not be clearer that the Company, in accordance with the parties' long-standing agreement, did not bargain with the Union prior to implementing changes to MEDCAP or the Dental Plan.

A. The Record Shows the Company Did Not Bargain Over the Changes it Announced and Implemented to MEDCAP and the Dental Plan (Exception Nos. 13-18, 37-38, 48)

There is no reference in Judge Rosas' decision to a single instance in which the Company and the Union bargained to agreement or impasse prior to DuPont implementing any of the dozens of changes to MEDCAP and the Dental Plan. And there is no such evidence in any of the bargaining notes in the record, spanning 73 separate labor-management meetings.

In fact, the record evidence demonstrates unequivocally that the Company did not bargain to agreement or impasse prior to making changes. The Company simply "reviewed,"

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[16] For example, Judge Rosas states: (1) "the Company acknowledged an obligation to bargain or agreed to the Union's request to bargain over changes," (2) "the Union insisted on bargaining over these changes and the Company agreed," and (3) "[n]otwithstanding the parties history of bargaining over the Company's numerous changes to its benefit plans," all suggesting that the Company sought the Union's agreement in bargaining before making changes to MEDCAP and Dental. (ALJD 8:18-19; 9:11-12, 18-19). As explained below, there is no evidentiary support for any such suggestion.

"covered," and/or "informed" the Union of upcoming MEDCAP and Dental Plan changes. (*See e.g.,* Derr, 237). And Counsel for the Acting General Counsel's sole witness, Union Treasurer Donny Irvin, conceded that DuPont made numerous changes to the Dental Plan and MEDCAP all without first bargaining with the Union.

> Q. And do you recall, in one of your statements, saying that prior to the Company's 2006 changes to the MEDCAP and dental plans, there were changes to premium rates, [changes] in which dependents [were] covered by the plans, and change[s] to same sex partner coverage? Do you remember that?
>
> A. Yes.
>
> Q. That's true, right.
>
> A. Yes.
>
> Q. Okay. In fact, you go on to say there were changes to premiums with both plans almost every year since 1993. That's true as well, right?
>
> A. Yes.
>
> Q. The Company consistently made changes to the MEDCAP and Dental Assistance Plans, right?
>
> A. Yes.
>
> Q. . . . And prior to 2006, the Company never came to the Union and sought its agreement prior to making those changes, correct?
>
> A. Correct.
>
> Q. But [the Company] did come to the Union and provide notice of the changes that were coming, correct?
>
> A. Yes.
>
> Q. And then the Company made the changes?
>
> A. Yes.
>
> * * *

Q. In those past changes, did the Union bargain over how the changes were implemented?

A. No.

(Irvin, 38; 88-89) (emphasis added).

The Company's witnesses, and lead bargainers, likewise testified that the Company never bargained with the Union with respect to any of the changes made to MEDCAP or the Dental Plan. (Derr, 236-238; Rhodes, 259-262).[17] Moreover, the Company's bargaining notes show that the Company specifically informed the Union, on multiple occasions, that it was not bargaining, would not bargain, and was not required to bargain, with the Union over changes to MEDCAP and the Dental Plan:

- Management distributed Benefits Schedule for the Dental Assistance Plan (copy attached to file copy). Management said it continues to routinely look at Benefits Plans, and this upgrade would become effective 10/01/86. . . The Union said it does not feel this is a bargaining session, but that this meeting is being held just for information. . . (Resp. Exh. 3, tab 25, p. 1).

- Management said the Union had asked earlier if a pensioner is guaranteed a medical plan when that person retires. . . Management has reserved the right to change and modify or discontinue the plan if needed. (Resp. Exh. 3, tab 27, p. 3).

- The Union asked if Management is in a position to bargain schedule changes to the Dental Assistance Plan? Management said the Plant Manager can replace the Corporate Plan with a local plan. If the

[17] The only evidence the ALJ cites that reflect even a hint of potential bargaining over past changes relates to passages from bargaining notes in 1987 referencing a possible Dental Plan change. (ALJD 8:19-24). The passages referenced cite to potential changes to multiple benefit plans, not just the Dental Plan, so the notes hardly reflect a Company concession of an obligation to bargain over changes. Additionally, there is no evidence that the parties actually bargained over the change. More importantly, a single, ambiguous reference to possible bargaining over a single change, even if credited, does not negate the Union's express waiver, nor supplant the 30-year history of contrary past practice reflected in notes of more than 70 meetings between the Union and the Company.

Union wants to make a proposal, Management will consider. **The Union asked can Management change the current G and H schedules of the Dental Assistance Plan? Management said it cannot change the G and H schedules because they are Corporate Schedules, but, again, Management will listen to any proposal from the Union concerning a local Dental Assistance Plan**. (Resp. Exh. 3, tab 32, p. 6) (emphasis added).

- The Union asked if health care premiums would remain the same over the life of the contract. Management said it reserves the right to modify the plan, and premiums would be changed as necessary yearly. (Resp. Exh. 3, tab 49, p. 1).

Judge Rosas erred by ignoring this undisputed evidence.[18]

B. DuPont's Willingness to Provide Information Concerning Medical and Dental Benefits Does Not Constitute an Admission that DuPont Had an Obligation to Bargain Over Changes to MEDCAP or the Dental Plan. (Exception Nos. 8-10, 42, 49)

Judge Rosas concluded that the Company had "bargained" over past changes to MEDCAP and the Dental Plan simply because the Company was willing to provide information to the Union concerning certain of the MEDCAP or Dental Plan changes and/or medical or dental benefits generally. (*E.g.* ALJD 16:40-44). In effect, the ALJ suggests that by providing requested information DuPont somehow conceded that it lacked the right to make changes that were the subject of the requests without first bargaining to agreement or impasse. Judge Rosas' conclusion is both legally and factually erroneous for several reasons.

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[18] The Judge also misconstrued the parties' history of bargaining in several material respects. For example, the Judge noted that "the Company agreed to bargain over proposed changes to the BCBS premium increases" on September 22, 1987, and "announced" in 1992 and 1993 that "bargaining over increases to health care premiums already occurred or would be taking place" (ALJD 8:26-28). Both of these references relate to the local BCBS Plan referenced the parties' contract, not the corporate-wide MEDCAP and Dental Plans. There is no question that DuPont had an obligation to bargain over changes to the local BCBS Plan, which covered only Spruance employees and does not contain an agreed-upon reservation of rights provision. And the Company has never asserted otherwise.

1. Judges Rosas' Conclusion that DuPont Agreed to Bargain Over Past MEDCAP and Dental Plan Changes by Agreeing to Provide Information Is Wrong as a Matter of Law

Responding to requests for information that relate to a subject over which a union has waived the right to bargain in no way creates a duty to bargain over that subject or otherwise constitutes an admission that no waiver exists. *Ingham Regional Medical Center*, 342 NLRB 1259 (2004) (finding a clear and unmistakable waiver of the right to bargain despite the fact that management provided information to the union regarding the subject matter over which the union had waived its right to bargain); *Western Summit Flexible Packaging*, 310 NLRB 45 (1993) (Union waived the right to bargain over new insurance plan, even though management responded to information requests regarding the new plan); *Budd Co*., 348 NLRB 1223 (2006) (despite Union's requests for information and the company's cooperation with such requests, management rights clause reflected waiver of the Union's right to bargain over new safety rules).

The recent *DuPont cases* are illustrative. There, the Board recognized that the Company had the right to make unilateral changes to BeneFlex during the term of the contract, due to the union's express waiver as reflected in the parties' contract. *E. I. DuPont de Nemours (Louisville Works)*, 355 NLRB Slip Op. 176 (August 2010) and *E. I. DuPont de Nemours & Co.*, 355 NLRB Slip Op. 177 (August 2010). Here, the BeneFlex plan was referenced in the parties' collective bargaining agreement from 1995 onward. The evidence shows that the Company made changes to BeneFlex each and every year, pursuant to the reservation of rights language in BeneFlex and the IRP&P provision in the contract. The record further shows that the Union asked for information concerning those BeneFlex changes, and the Company provided information in response. Using ALJ Rosas' logic, the Company's responses to the Company's information requests would negate the express waiver found in the parties' contract as well as the BeneFlex plan language. This is not, and has never been, the law.

2. Judge Rosas Failed to Appreciate the Scope of the Union's Waiver and DuPont's Obligation to Bargain Over Medical and Dental Coverage Issues Generally

The Company has never claimed that the Union, by virtue of waiving its right to bargain over the changes to MEDCAP and the Dental Plan, had waived its right to bargain over the subject of medical or dental care. Indeed, as stated in the Judge's decision and reflected in the record, the Company has consistently informed the Union that while it would not bargain over changes to the corporate-wide plans, it would consider and bargain over any local medical or dental plan the Union might wish to propose for Spruance. In order to consider whether a local plan might be preferable to the existing corporate-wide plans, the Union clearly had a right to information concerning the coverage provided under MEDCAP and Dental, and any changes thereto. And the Union availed itself of that right, as Judge Rosas correctly noted:

> In 1988, 1996, 1999, 2000 and 2003, the Union requested, and the Company agreed to provide, information relating to announced premium increases in order to research alternative insurers. In 2001 and 2002, the Union requested similar premium rate increase information and the Company did not deny the requests.

(ALJD 7:24-29). The Company's willingness to bargain with the Union over alternative health care plans and to provide information concerning premium increases and other announced changes to MEDCAP and the Dental Plan to facilitate such bargaining certainly is not an admission that the Company lacked the right to change the plans unilaterally. In fact, the Company would have committed an unfair labor practice if it had not provided the Union with the requested information because, while the Union expressly waived its right to bargain over changes to MEDCAP and the Dental Plan, it did not waive the right to bargain over the entire subject of medical or dental care coverage, and the Company has never claimed otherwise.

The Judge, selectively citing an internal Company memorandum, further states that the Company "acknowledged its obligation to furnish information relevant to bargaining" with

respect to the August 2006 benefit plan changes, suggesting that this was an admission by the Company of an obligation to bargain over the 2006 changes at issue. It clearly was not. What the Judge failed to state is that the very document he cites, entitled "Union *Notification* Guidelines" – not Union *Bargaining* Guidelines – explicitly states, *inter alia*:

> These benefits changes can be made under the terms of the benefit Plans we have in place today, subject to appropriate one-year notice requirements.
>
> Notification Objectives:
>
> To inform the union of the purpose of the employee meetings today, to share the highlights of the benefit changes in advance of the employee meetings, and to give them notice of the planned changes.
>
> If union representatives object to the changes, indicate that management can make the changes within the terms of the current plan language but that management is willing to meet with the union at a future date to entertain any thoughts the union might have about the planned changes.
>
> If the union requests to bargain, make every effort to set up a bargaining meeting at your earliest convenience. However, remind the union that this meeting is not a bargaining session, but a notification meeting.
>
> Q6. When will you meet with us to bargain some alternative plans?
> A6. We can begin negotiations as soon as we can settle on a meeting date and time.
>
> Q10. Why don't you have to bargain these changes?
> A10. All of these changes are within the scope of the management's rights provision of the benefit plans [and] [sic] apply company wide.

(GC Exh. 36). Thus, the very document from which the Judge selectively quotes actually sets forth the Company's view that it did not have any obligation to bargain over the 2006 changes based on the reservation of rights or "management's rights" clauses in the relevant benefit plans. But, consistent with long-standing practice, the Union Notification Guidelines reflect the Company's willingness to bargain with the Union over benefits generally, to entertain proposals for alternative benefit plans, and to respond to information requests.

3. The Judge's Conclusion Is Inconsistent With Sound Labor Policy

The Judge apparently suggests that DuPont would not, and should not, have provided the Union with information relating to the premium rate increases or other changes to MEDCAP or the Dental Plan if the Company truly believed it had the right to modify those Plans unilaterally. The logical conclusion stemming from this suggestion is that an employer should never provide a union with information unless it is legally required to do so, because providing the information may be considered an admission that could be used against the Company. Such an approach would be wholly contrary to sound labor relations policy and would simply invite misunderstandings and litigation. Employers and unions alike have an interest in ensuring employees understand their benefits. Union leaders, armed with information about benefits, can help ensure employees have accurate information. If Judge Rosas' conclusion here is supported, employers will be less likely to share information with unions, as they would do so at the risk of creating a legal obligation to bargain over the topic on which information is provided. This result would harm employees, who would have less information, and undercut the stability of company-union relationships.

III. THE JUDGE MISAPPLIED THE BOARD'S DECISIONS BY FAILING TO FIND A WAIVER THROUGH THE PARTIES' CONSISTENT PAST PRACTICE

Judge Rosas misapplied Board law and confused the record when analyzing the Company's past practice evidence. In addition to confirming the Union's express waiver, the Company's consistent past practice of making unilateral changes to MEDCAP and the Dental Plan created an implied waiver and became the *status quo ante* given: (1) the frequency of the changes; (2) and significance of the changes; and (3) the extended period over which the Company invoked its right to make changes.

A. The Judge Erred in Finding the Absence of a Uniform and Consistent Past Practice of Unilateral Changes to MEDCAP and the Dental Plan. (Exception Nos. 13-18, 37-38, 48)

Judge Rosas found the lack of an implied waiver based, in part, on his determination that DuPont's history of changes to MEDCAP and the Dental Plan was a "mixed bag of transactions" based on Union information requests and/or requests to bargain. (ALJD 15:2-4). In so doing, the ALJ clearly misconstrued the record.

As demonstrated above, DuPont maintained a consistent practice of modifying MEDCAP and the Dental Plan unilaterally without bargaining, and there is not a shred of record evidence to suggest the Company ever bargained to agreement or impasse with the Union over changes to MEDCAP or the Dental Plan. The decades-long practice of changes, coupled with the Union's failure to object, creates a waiver of the Union's right to bargain under existing Board law. *See e.g., Post-Tribune*, 337 NLRB 1279 (2002) (employer privileged to make unilateral changes to employee health insurance benefits, even during contract negotiations, because the changes were consistent with past practice); *Beverly Health & Rehabilitation Servs., Inc. v. NLRB*, 297 F.3d 468 (6th Cir. 2002) (employer's post-contract change did not violate the Act where it was consistent with a history of unilaterally altering disciplinary rules and work schedules pursuant to the expired management rights clause).

Moreover, this is not a case where the Union acquiesced to minor changes on just a handful of occasions so as to render the Union's inaction meaningless. Rather, the record shows, and the Judge found, that most of the pre-2006 changes to MEDCAP and the Dental Plan reduced or restricted benefits and were extremely significant. The Company raised the cost of medical premiums, co-pays and/or deductibles for plan participants virtually every year since 1993 – a period spanning more than decade. And many of these cost increases were substantial. For example, in 2002, the Company announced changes in the way it calculated retiree medical

coverage costs; as a result, retirees were required to pay 50% of their entire health care cost. (Irvin, 78). That same year, the Company announced an absolute cap on company contributions to retiree medical and prescription coverage under MEDCAP. After the caps were reached, employees would be 100% responsible for the cost of any additional required coverage. Two years later, in 2004, the Company unilaterally increased the retiree health care premiums under MEDCAP by 30%. (Irvin, 86).

In addition, the Company changed eligibility rules for working spouses unilaterally every year from 1994 through 2002. Beginning in 1994, a working spouse was precluded from enrolling in DuPont's medical plan if the actual cost of coverage in his or her employer's plan was less than $35 in 1994. DuPont increased that amount each year until it reached $100 in 2002. Similarly, in 2004, the Company modified the plans' dependent eligibility criteria – unilateraly – which "terminated" benefits under MEDCAP and the Dental Plan for all dependants over age 18 unless they were full-time students or disabled. (Resp. Exh. 11, tab 44; Irvin, 84-85).

All the aformentioned changes were clearly significant and detrimental to the interests of Union-represented employees. The record conclusivley shows that the Company did not bargain with the Union over any of these significant changes, and that the Union neither requested bargaining over the changes nor filed any grievances or unfair labor practice charges challenging the Company's right to implement them. Accordingly, the Company's past practice constitutes a waiver of the Union's right to bargain under *Mt. Clemons*, *Litton*, and *California Pacific.*[19]

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[19] The Judge attempted to distinguish *Litton* and *California Pacific* on the basis that the established past practice in those cases was consistent with the management rights clause in the parties' collective bargaining agreement. (ALJD 14:28-44). That is a distinction without a difference because here the Company's past practice, while not governed by a management

(continued…)

B. The Judge Misapplied Board Law Regarding Past Practice as Set Forth in *Courier Journal* and Recent *DuPont* Cases (Exception Nos. 39-43)

As the Judge correctly noted, the Board in *Courier-Journal*, 342 NLRB 1093, 1095 (2004), held "that a unilateral change made pursuant to longstanding practice is essentially a continuation of the status quo and not a violation of Section 8(a)(5)." (ALJD 15:26-27). The Board recently reaffirmed that principle in two DuPont cases, *E. I. DuPont de Nemours (Louisville Works)*, 355 NLRB No. 176 and *E.I. DuPont de Nemours*, 355 NLRB No. 177. Judge Rosas failed to apply correctly the governing principles set forth in *Courier-Journal* and the *DuPont* cases.

In *Courier-Journal,* the employer maintained a health care plan for employees and negotiated a provision in its collective bargaining agreement that reserved to the employer "the right to modify or terminate" the health care plan. (342 NLRB at 1093). The employer made unilateral changes in the costs or benefits of health insurance for both union and non-union employees each year, for 10 years, starting in 1991. (*Id*.). Some of these changes were made while the parties' collective bargaining agreement was in effect, and some were made in "hiatus" periods between contracts.

In September 2001, the employer announced an increase in heath care premiums, during a period in which a collective bargaining agreement was not in effect, and for the first time the

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(continued…)

rights clause in a collective bargaining agreement, was consistent with the parties' bilateral agreement as reflected in the reservation of rights clause set forth in both benefit plans. Similarly, the Judge attempts to distinguish *Mt. Clemons* on the basis that the Union failed to request bargaining over any of the changes made by the employer over a 20-year period. The record here is virtually identical. The Company made dozens of significant changes over a 20-year period without objection or specific Union requests to bargain over the changes themselves prior to their implementation. As demonstrated previously, the Union's scattered requests for general information concerning the changes do not constitute an objection to the changes or a specific request to bargain over the changes prior to their implementation.

union objected to the unilaterally-imposed increase, claiming the change violated Section 8(a)(5). (*Id*.). The Board dismissed the union's charge, finding that the announced changes were consistent with the Company's 10-year past practice of making changes, both during contract and during hiatus periods, without objection by the union. (*Id*. at 1094). The Board noted that its finding was not grounded in waiver, but rather was "grounded in past practice, and the continuation thereof." (*Id*. at 1094-1095).

The Board applied the *Courier-Journal* analysis in its recent decisions in *E. I. DuPont de Nemours (Louisville Works*), 355 NLRB No. 176 and *E. I. DuPont de Nemours & Co.*, 355 NLRB No. 177. In both of those cases, DuPont argued, *inter alia,* that changes to the Company's BeneFlex plan that occurred during a hiatus period between contracts were not unlawful because those changes were fully consistent with the Company's practice of making BeneFlex changes. The Board found the *DuPont* cases distinguishable from *Courier-Journal* because the unilateral changes to BeneFlex in the *DuPont* cases were implemented during periods in which a contractual waiver, permitting such changes, was in force and, therefore, did not establish a binding past practice once the contractual waiver was no longer applicable. In other words, the union in the DuPont cases could not have successfully challenged the BeneFlex changes made during the contract because they were specifically authorized by the express waiver reflected in the parties' collective bargaining agreement.

By contrast, the employer's past practice of making benefit plan changes unilaterally in *Courier-Journal* continued during periods when a contract granting the right to make the changes was not in force and, therefore, the Union in *Courier-Journal* had the ability to challenge the employer's right to make the changes. It is clear that the Board rejected the Company's past practice argument in the *DuPont* decisions – after applying *Courier-Journal* –

solely because, in the Board's view, DuPont did not offer sufficient evidence to establish a past practice of unilateral changes during periods when a contract authorizing the changes was not in force.

ALJ Rosas misconstrued the analysis applied in the *Courier-Journal* and *DuPont* cases, stating that "the Board's language in *DuPont* suggests that it is distinguishable from *Courier-Journal* because the employer had not established a long-standing past practice throughout all phases of the life of the collective bargaining agreement." (ALJD 16:15-17). The key fact cited by the Board, which existed in *Courier-Journal* but the Board found lacking in the *DuPont* cases, was a longstanding past practice of unilateral changes that were not specifically authorized by the parties' collective bargaining agreement – not the changes over the life cycle of a collective bargaining agreement as the ALJ mistakenly suggests.

As demonstrated above, all of the unilateral changes that DuPont has made to MEDCAP and the Dental Plan, including the 2006 changes at issue here, were made pursuant to bilateral agreements reflected in the benefit plans' reservation of rights language. But, the decades-long past practice of unilateral changes clearly satisfies the controlling *Courier-Journal* standard, even assuming, *arguendo*, that the changes were not authorized by the reservation of rights provisions, because the past practice of unilateral changes continued for an extended period, including periods when the changes were not implemented pursuant to a provision in the collective bargaining agreement.[20]

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[20] To the extent the ALJ's analysis turns on the absence of any mention of MEDCAP and the Dental Plan in the contract, his analysis is contrary to that set forth in *Courier Journal*. There is no question that a bilateral agreement existed, pursuant to which the Union participated in MEDCAP and the Dental Plan, and that there was a decades-long practice of DuPont making changes unilaterally.

The Dental Plan was referenced in the IRP&P provision of the parties' contract from 1976 through 1995. (Resp. Exhs. 5(a), 5(b), 6(a), 6(b), 7(a), and 7(b)). During that time, the Company made multiple unilateral changes to the Dental Plan. Those unilateral changes were not only consistent with, and authorized by, the negotiated reservation of rights language, but also expressly authorized by the contract's IRP&P provision. *See E.I. DuPont de Nemours*, 355 NLRB No. 177 (recognizing that DuPont was contractually authorized to make BeneFlex changes without bargaining with the union under the terms of the IRP&P provision during the term of the parties' contract); *see also E.I. DuPont de Nemours (Spruance),* (Arb. Jaffe, 2009) (finding that DuPont was contractually privileged to make unilateral changes to benefit plans identified in the IRP&P provision); *E.I. DuPont de Nemours (Parlin)* (Arb. Zuckerman 2011) (finding that DuPont was privileged to change the DuPont Vacation Plan unilaterally because it was listed in the IRP&P provision).

All references to the Dental Plan were removed from the parties' contract in 1995, after BeneFlex was adopted to provide benefits to active employees. Although the Dental Plan was no longer listed in the contract's IRP&P provision, the Company continued its practice of making unilaterally changes to the Dental Plan for more than 10 years prior to the 2006 changes at issue here. (Resp. Exh. 11). Accordingly, the established past practice with respect to the Dental Plan is fully consistent with the analysis applied in *Courier-Journal*. In both cases, the employer made numerous unilateral changes that were authorized by a collective bargaining agreement, and continued that practice of making unilateral changes during extended periods when the changes were not specifically authorized by a collective bargaining agreement.

The case for waiver is even stronger with respect to MEDCAP, as the changes to MEDCAP were <u>never</u> authorized by a specific provision in a collective bargaining agreement.

Instead, they were authorized by the reservation of rights provision that was agreed to by the Union in exchange for the right to have Union members participate. The Union's express waiver, as embodied in the plans' reservation of rights language, has never expired and remains in full force and effect. Assuming *arguendo* that the 2006 MEDCAP changes were not authorized pursuant to an express waiver in the reservation of rights provision, then the changes are lawful under the teaching of *Courier-Journal* as they represent the status quo of two decades of consistent unilateral changes that were not otherwise authorized by a collective bargaining agreement or other bilateral Company-Union agreement.

IV. JUDGE ROSAS' REMEDIAL ORDER IS CLEARLY ERRONEOUS BECAUSE IT IS INCONSISTENT WITH THE *STATUS QUO ANTE* (Exception Nos. 79-85)

The Board has long held that the appropriate remedy in a case in which an employer has made unilateral changes in violation of Section 8(a)(5) is to require the employer to rescind the unlawful changes to restore the *status quo ante*. Judge Rosas' remedial order is inconsistent with the *status quo ante* because it would require the Company to restore the "unit employee's retirement and dental benefits to the terms that existed prior to December 20, 2006, and maintain those terms until the parties have bargained and agreed to material changes." (ALJD 19:44-45;-20:1-4).

The appropriate remedy, assuming a violation were found, is to require DuPont to rescind the amendments made to MEDCAP and the Dental Plan, and restore the terms of those plans to those that existed prior to the amendments – not to render employees hired after January 1, 2007 eligible for benefits under those plans. To be eligible to receive benefits under the terms of MEDCAP and the Dental Plan, an employee must do more than simply "retire" from DuPont. (*See* Jt. Exh. 1C). An employee must retire under the terms of DuPont's Pension and Retirement Plan, meeting the age and service requirements to attain the status of a "pensioner," in order to

be eligible for retiree medical benefits under either MEDCAP or the Dental Plan. That has been the case since the creation of MEDCAP and the Dental Plan decades ago.

On August 28, 2006, DuPont announced changes to its Pension Plan and the Savings and Investment Plan ("SIP") in conjunction with the changes to MEDCAP and the Dental Plan at issue here. Pursuant to those changes, employees hired after January 1, 2007 would not be eligible to participate in DuPont's pension plan, but instead would receive a greater Company contribution to their SIP accounts. As a result of those changes, employees hired after January 1, 2007, will not attain the status of a "pensioner" and therefore will not be eligible for retiree medical benefits – with or without the rescission of unilateral changes to MEDCAP and the Dental Plan at issue here.

The Union challenged the Company's right to change the Pension Plan unilaterally. Arbitrator Ira Jaffe upheld the Company's right to modify the Pension Plan unilaterally and, as a result of Arbitrator Jaffe's ruling, employees hired at Spruance on or after January 1, 2007 are not eligible to participate in DuPont's Pension Plan and are therefore not eligible to participate in the MEDCAP or Dental Plan. Accordingly, while it would be appropriate to require DuPont to rescind the unilateral changes made to MEDCAP and the Dental Plan at issue here, it would not be appropriate to confer eligibility for benefits under those plans to employees hired after January 1, 2007, because those employees would not be eligible for such benefits irrespective of whether DuPont had made the changes at issue here. In a very real sense, the changes DuPont made to MEDCAP and the Dental Plan did nothing more than clarify the impact of the changes made to the Pension Plan.

Finally, the Judge exceeded his authority by requiring DuPont to maintain the terms of the pre-December 20, 2006 MEDCAP and Dental Plan until the parties "have bargained and

agreed to material changes." While it is appropriate to require the parties to bargain over future change, if a violation were found, it is not appropriate to require a party to make a change only if the parties reach agreement, as DuPont should be afforded the right to modify the plans if, after good faith bargaining, a lawful impasse is reached which would otherwise permit DuPont to implement changes consistent any final proposal made on the subject.

CONCLUSION

For all of the foregoing reasons, Judge Rosas' Decision should be reversed, and the Complaint should be dismissed.

Respectfully submitted,

/s/ Kris D. Meade

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October 14, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 14th day of October 2011, I caused a true and accurate copy of DuPont's Exceptions to Decision of Administrative Law Judge Michael F. Rosas and Brief In Support thereof to be served by electronic mail on the following parties:

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/s/ Glenn D. Grant
Glenn D. Grant

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Exhibit A

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MAY 10 2011

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration Between

International Chemical Workers Union Local 527C

FMCS No. 10-56205-1

And

E.I. DuPont de Nemours and Company

Before: Marilyn H. Zuckerman, Esq.

Appearances:

For the Union: Robert W. Lowery, Esq.

For the Company: Kris D. Meade, Esq.
Glenn D. Grant, Esq.
Jane Foster, Esq.

Dates of Hearing: January 26 and 27, 2011

Place of Hearing: Newark, NJ

Briefs Filed: March 25, 2011

Introduction

This case involves DuPont's notice to the Local Union in October 2009 that the Company's vacation plan would be amended to modify the way in which employees would accrue vacation in the future. Effective December 31, 2010, employees would no longer accrue all of their next year's vacation in a lump sum each December 31, but would rather begin accruing vacation on a pro rata, month-by-month basis throughout the year.

DuPont is a US corporation with many manufacturing facilities located throughout the country. Fewer than twenty percent of all DuPont employees nationwide are represented by labor unions. DuPont also has certain foreign corporate affiliates which operate as

separate and distinct legal entities. The employees of the foreign affiliates do not participate in DuPont's Vacation Plan or in any of the Company's other corporate-wide benefit plans (Tr. 311, 314). E.I DuPont de Nemours and Company operates only in the US and is the entity that is signatory to the collective bargaining agreement at issue.

The present dispute involves employees who work at DuPont's Parlin plant in Parlin, NJ. Parlin employees are represented by two unions: the Parlin Employees Association and the ICWU. The present dispute involves only the ICWU.

The first collective bargaining agreement between the ICWU and DuPont was dated December 21, 1950. The parties' current CBA is dated June 11, 1992. This CBA renews each year unless either party gives notice of a desire to terminate the Agreement. The CBA contains an Industrial Relations Plans and Practices ("IRP&P") provision.

Background

The Present Change.

DuPont's Vacation Plan has been in effect since 1934 (Tr. 26, Jt. Ex. #6) and applies to all DuPont employees in the US both union and non-union. Prior to the Vacation Plan change at issue here, employees with at least one year of service received all of their vacation allotment for an upcoming year in a lump sum on December 31 of the prior year (Tr. 316). For example, on December 31, 2008, a thirty-year employee who was entitled to six weeks of vacation would have accrued six weeks of vacation for use during 2009. This methodology was known as "the big bang accrual" because the award of vacation benefits happened all at once (Tr. 318). The thirty year employee was also permitted to carry over up to six weeks of accrued vacation in addition to the six weeks that he accrued each December 31 (Tr. 319-320). The thirty year employee would have started

2009 with twelve weeks of vacation if he carried over the maximum six weeks of unused vacation from the previous year. The same employee would have received another six weeks of vacation on December 31, 2009. If the employee had not used any of the twelve weeks of vacation that he had at the start of 2009, he would have had a total of eighteen weeks of unused vacation as of December 31, 2009 in this example. If the employee retired or otherwise left the Company on December 31, 2009, he could have cashed out the entire eighteen weeks of vacation on that day (Tr. 213-214).
If the employee did not retire on December 31, 2009 and worked the next day on January 1, 2010, the employee would have forfeited six weeks of vacation as a result of the pre-existing vacation carry-over limitation.

In October 2009, DuPont announced a change to the Vacation Plan which would become effective on December 31, 2010. The Vacation Plan was amended so that employees would no longer accrue vacation for the following year in a lump sum on December 31 but would accrue vacation on the first day of each calendar month in the coming year (Tr. 119-120). The fourteen months' notice of the change satisfied the notice requirement of the Vacation Plan's reservation of rights. Because of the advance notice, Union employees at Parlin had the option of retiring on December 31, 2009 to take advantage of the last year in which the "big bang accrual" vacation pay-out would be available (Tr. 141).

Notice of the change was given to the Local Union in an October 5, 2009 Union/Management meeting. The Union indicated at the meeting that it would review the proposed changes to the Vacation Plan to see if it would agree. (There were other changes to the plan which are not at issue here.) The Employer took the position that

because of the language in the Vacation Plan and the Union's acceptance of the collective bargaining agreement, Management could make the change at issue with a one year notification which was provided.

On November 5, 2009, Local Union President, Mike Rock, gave DuPont written notice of a request to bargain over the present change (Company Exhibit #5). The Company, by Gary Luciano, HR Manager, responded by letter of November 11, 2009 that DuPont had not made any changes to the collective bargaining agreement because the changes were being made pursuant to the IRP&P and were corporate-wide. The Employer also took the position that it had no duty to bargain because of the reservation of rights clause (Company Exhibit #6).

On December 30, 2009, the Union filed a charge with the NLRB, Region 22 alleging a violation of Section 8 (a) (1) and 8 (a) (5) of the Act (Union Exhibit #5). On January 14, 2010, the Union filed the present grievance (Joint Exhibit #1). On March 15, 2010, the NLRB deferred the Union charge to the grievance/arbitration process (Union Exhibit #6). The Company's second step answer to the grievance was a denial on the basis that the changes to the Vacation Plan were to be implemented throughout E.I. DuPont De Nemours and Company. The grievance was also denied for the stated reason that the Union had agreed to the collective bargaining agreement which had been in effect since 1992. The Employer took the position that Article VII, Section 1 and the Vacation Plan provisions permitted the Company to make unilateral changes to the Vacation Plan subject to the requirements therein (Joint Exhibit #3, p.2).

The Employer's reasons for the Vacation Plan change at issue were economic. The Company asserts that the change was made in order to keep DuPont in line with its frame

of reference companies including Alcoa, Boeing, Caterpillar, Honeywell and Proctor and Gamble (Tr. 316). The Union presented unrefuted testimony at the arbitration that the Company would save millions of dollars as a result of the present change.

Prior Changes to the Vacation Plan.

The Company takes the position that the 2009 Vacation Plan amendment was consistent with other changes that DuPont made to the Vacation Plan in the past. The Vacation Plan has always contained "reservation of rights" language. The current language has remained unchanged since 1959 and states:

> The Company reserves the right to change or discontinue this Plan if it determines that such action is advisable; provided however, no change in the Plan will be made which has the effect of reducing vacation benefits for any calendar year unless such change has been announced in the preceding year (Joint Exhibit #6).

DuPont has amended the Vacation Plan a number of times throughout the past sixty years. The Plan was amended several times to increase benefits. The Union did not request to bargain regarding these changes because the changes were beneficial to the employees. However, the Company has also modified the Vacation Plan to reduce benefits. For example, in 1964, the Company amended the Plan to limit the number of weeks of vacation that an employee could carry over in any year (Company Exhibit #15(b)). In 2006, the Company gave notice to the Union that beginning in 2007, the maximum vacation allotment for new hires would be reduced from six weeks to five weeks after twenty years of service (Company Exhibit #15). While the Union maintains that existing employees were grandfathered in as a result of local negotiations, the Company maintains that the change was only intended to apply to new hires and was never meant to apply to pre-2007 hires.

Prior Changes to Other Benefit Plans.

DuPont maintains that it has made many changes to other corporate wide benefit plans without bargaining with the Union over these changes. The Company's notes of its Union-Management meetings over the sixty years of collective bargaining reflect the Company's practice of announcing to the Union all changes in the IRP&P benefit plans. (See Company Exhibit #1.)

The annual announcement and implementation of changes to the Company's BeneFlex Benefit Plan ("BeneFlex") is an example of the Company's unilateral change to its benefit plan offerings, including changes that have a negative effect, without first bargaining with the Union. HR Manager Gary Luciano has announced BeneFlex Plan changes every Fall since 1994 when BeneFlex was agreed to at Parlin. These changes included many "deliberalizations" or negative changes (Tr. 167). The annual BeneFlex changes have had a significant impact on bargaining unit members since the changes have resulted in increased cost of medical care through increased premiums, co-pays and deductibles and other negative effects (Tr. 257-258). The Company and the Union have never bargained over these changes or their effects and the Union has never filed a grievance or an unfair labor practice charge over the Company's failure to bargain over any of these changes.

Relevant Contractual Provisions

> Article II, Recognition
> Section 1. The UNION has been and is recognized as the exclusive bargaining agency for the employees of said Parlin Plant for the purpose of collective bargaining with respect to rates of pay, wages, hours of work, and other conditions of employment.

Article VII, Industrial Relations Plans and Practices
Section 1. All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY shall continue, subject to the provisions of such Plans and to such rules, regulations and interpretations as existed prior to the signing of this Agreement, and to such modifications thereof as may be hereafter adopted generally by the COMPANY to govern such privileges; provided, however, that as long as any of these COMPANY Plans and Practices is in effect at any other Plant within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement:

Non-Contributory Group Life Insurance Plan
Contributory Group Life Insurance Plan
Salary Allotment Insurance Plan
Short Term Disability Plan
Pension and Retirement Plan
Special Benefits Plan
Vacation Plan
Service Emblem Plan
Continuity of Service Rules
Savings and Investment Plan
Dental Assistance Plan
Total and Permanent Disability Income Plan
Health Care Spending Account Plan
Dependent Care Spending Account Plan
Retirement Restoration Plan

Section 2. Any employee's length of service for consideration of benefits under the COMPANY'S Industrial Relations Plans and Practices shall be his continuous service with the COMPANY as calculated in accordance with the COMPANY'S Continuity of Service Rules.

Article XVII, Life of Agreement
Section 1. This Agreement shall continue in full force and effect through September 24, 1992 and from year to year thereafter unless at least sixty (60) days prior to any expiration date, either party notifies the other in writing of its desire to terminate this Agreement, in which event the Agreement shall terminate on the expiration date of the contract term in which the notice is given.

Section 2. If either party desires to modify or change this Agreement at any expiration date, it shall, at least sixty (60) days prior to such date, give notice in writing of the desire to modify or change. If notice to modify or change is thus given by either party, the Agreement shall be deemed to have been opened

for bargaining on any or all provisions or on any new provisions. After the provisions of this Section 2 have been invoked, in the absence of termination pursuant to Section 1 of this Article, all the provisions of this Agreement shall continue in full force and effect unless and until modified in accordance with this Section.

Section 3. In the event that the COMPANY should give the Union a one (1) year notice of intent to make effective a general deliberalization or termination of an Industrial Relations Plan or Practice listed in Article VII of this Agreement, and such one (1) year period would elapse before the expiration date of this Agreement, the UNION shall have the right to terminate this Agreement upon the effective date of such change, provided it gives not less than sixty (60) days' notice of such intention prior to the said effective date.

Statement of the Issue

At arbitration, the parties did not agree on a Statement of the Issue and left it for the Arbitrator to frame after hearing all of the evidence. In the parties' briefs, the Union and the Company stated the issue as follows:

Union. Whether or not the Employer violated the CBA between the Union and Company when it unilaterally changed the vacation compensation for earned vacation by its announcement of October 5, 2009, said announced change to be effective December 31, 2010 and if so, what shall be the remedy?

Company. Did the Union prove that the Company violated the terms of the collective bargaining agreement by implementing changes to its corporate-wide Vacation Plan without first bargaining with the Union?

The Arbitrator adopts the Union's Statement of the Issue as the issue to be decided.

Positions of the Parties

Union.

The Union argues that Article VII of the CBA has been violated. In that Article, the parties agreed that all existing privileges enjoyed by the employees as identified in the IRP&P of the Company should be continued subject to the provisions of the Plans as well as such rules, regulations and interpretations as existed prior to the signing of the Labor Agreement. One of the identified Plans in Article VII is the Vacation Plan. The Employer argues that Article VII contains the reservation of rights clause and that the Vacation Plan itself also has such a clause. But the Union is seeking to bargain about the effects of the December 31, 2010 change to the Vacation Plan and not over the change itself. Since vacations are a mandatory subject of bargaining under the National Labor Relations Act, the duty to bargain continues during the term of a collective bargaining agreement absent the Union's waiver of its right to bargain.

The Vacation Plan in the present case has been in place for over sixty years (Tr. 32). Prior to the October 5, 2009 announcement of the present change, the last change was in 2007 when the maximum number of vacation for certain employees was diminished from six to five weeks. According to then Local Union President Michael Rock, the 2007 change was modified as a result of local negotiations between the Union and the Company. The 2007 change was applied only prospectively and not retroactively; i.e., employees hired prior to December 31, 2006 and who were continuously employed by the Company after that date retained the right to a sixth week of vacation upon completion of thirty years of continuous service (Joint Exhibit #4). The Union did not

challenge the changes to the Vacation Plan prior to the 2007 change because the changes in the prior years liberalized the Vacation Plan.

The Union argues that silence in the face of prior unilateral changes does not constitute a waiver of the right to bargain. See E.I. DuPont De Nemours, Louisville Works and Paper, Allied-Industrial, Chemical and Energy Workers International Union and Its Local 5-2002, 355 NLRB No. 176 (2010). The Employer argues that because the 2009 change affected not just the Parlin, NJ facility, but all the DuPont facilities in the US, there was no duty to bargain. However, the Union maintains that for purposes of Section 8(a)(5) of the NLRA, it is immaterial that a Company's changes to a benefit plan involving a mandatory subject of bargaining were company-wide and affected both unit and non-unit employees. See Hardesty Company, Inc. d/b/a Mid Continent Concrete and Teamsters Local Union 373, 336 NLRB 258 (2001).

From its inception in 1934, the Vacation Plan in the present case included a practice that vacation for an employee accrued on the 31st day of December of a given year (Tr. 89). In 2009, the Employer sought to change the accrual mechanism for employee vacations from the "big bang accrual method" to accrual on a monthly basis starting in 2011. The effect of the change was to negate a practice which had been in place for over half a century. The custom prior to the change in 2011 allowed a retiring employee to have a retirement package which included up to eighteen weeks of accrued vacation. The Union argues that since an employee's vacation accrual had occurred on December 31 of a given year prior to the 2010 change, the prior practice was a well-settled condition of employment which was binding on the parties. See Michigan Department of State Police, 97 LA 721 (Kanner 1991).

The practice which the present Employer sought to change was unequivocal, clearly enunciated, acted upon and readily ascertainable over a long period of time such that it was a fixed and established policy accepted by the Union and the Employer. The interpretation of the Vacation Plan was inclusive of an accrual method that required the determination of eligibility for vacation to be made on December 31 of a given year. The Union concludes that the change in the accrual method as proposed in the 2009 amendment which was effective December 31, 2010 changed the interpretation of the Vacation Plan and therefore violated the CBA.

As a result, the Union asks the Arbitrator to sustain the grievance and to enter a make whole order for all employees who were adversely affected by the change.

The Employer.

The Company argues that it had the contractual right to change the Vacation Plan unilaterally and that DuPont satisfied the requirements of the IRP&P provision. The Employer points out that the change at issue affected all of DuPont's facilities nationwide and that the foreign corporate affiliates are handled separately. The Company maintains that it complied with the requirements of the IRP&P provision with respect to the Vacation Plan change at issue. DuPont adhered to the notice requirements in the reservation of rights provision of the Vacation Plan. The Company announced the Vacation Plan change on October 5, 2009, almost fourteen months prior to the effective date of December 31, 2010, thereby satisfying the requirement that all Vacation Plan changes were to be announced in the preceding calendar year.

While the Union seeks to bargain over the "effects" of the Vacation Plan change at issue, the Employer argues that there is no distinction between the change and the effect

of the change. DuPont maintains that the Union presented no record evidence that the effects of the Vacation Plan change are separate and distinct from the change itself. Since the Union is precluded from bargaining over the change itself by the reservation of rights language, the Union asserts a right to bargain over the effects of the change, but these are no different than the change itself.

The Employer argues that the Union's theory of "effects" bargaining is inconsistent with the intent of the parties as reflected in the IRP&P provision. See DuPont Spruance Works (Arbitrator Jaffe 2010) and E.I DuPont de Nemours, 355 NLRB Slip ops. 176 and 177 (August 2010). DuPont maintains that the present Arbitrator must reject the Union's argument about "effects" bargaining and simply apply the clear and unambiguous contract language. The Employer maintains that neither the IRP&P provision nor any of the other provisions of the CBA require the Company to bargain over changes that have adverse effects on employees or to otherwise engage in "effects" bargaining.

DuPont argues further that the Vacation Plan itself clearly contemplates future changes to the Plan which might have a negative effect: "no change in the Plan will be made which has the effect of reducing vacation benefits for any calendar year unless such change has been announced in the preceding year" (Joint Exhibit #4). DuPont maintains that pursuant to the Vacation Plan itself which is incorporated into the IRP&P provision of the CBA, any change to the Vacation Plan that has a negative effect requires only that DuPont provide notice of the change in the preceding calendar year. The Union's argument that DuPont has an additional obligation to bargain over the effects of vacation reductions must be rejected because it is inconsistent with the plain language of the Plan and would make the notice requirement superfluous.

The Employer next argues that the Union's theory of required "effects" bargaining is also inconsistent with more than six decades of uniform past practice. DuPont has modified the employee benefit plans or benefit plan offerings under the IRP&P provision hundreds of times since 1950 (Company Exhibits 15a-15c). Each of these changes had an effect on employees. For example, the annual change of raising premiums under the BeneFlex medical plan resulted in the effect of increased medical premiums. Each and every change identified in the Company's "Benefits Changes Chart" (Company Exhibits 15a-15c) was adopted and implemented by DuPont unilaterally without first bargaining the change, or the effect, with the Union.

The Employer maintains that even assuming arguendo that DuPont had some effects bargaining obligation in the present case, the Union's grievance is fatally flawed because there is no contract violation. See United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 US 593 (1960). "Effects" bargaining is a statutory principle under the NLRA which is intended to protect bargaining unit members when an employer makes a permissible unilateral decision that has effects on other terms and conditions of employment. If a union takes the position that an employer is obligated to bargain over the effects of a unilateral change, the union files an unfair labor practice charge under the NLRA. This is a procedure separate and distinct from the grievance procedure and to prevail on a grievance, a union must show that there was a contract violation. The Employer in the present case argues that there was none here.

Finally, the Employer maintains that the Union's implicit argument that the Company has taken away an expectancy that employees had that they would be entitled to retire on December 31 of any given year with the following year's vacation is without merit. Any

such expectancy is irrelevant according to DuPont because the CBA and the Vacation Plan clearly permit the Company to modify the Vacation Plan including its accrual provisions. DuPont argues that its decision to amend the Vacation Plan was permissible under the IRP&P provision, the change complied with the requirements of that provision and the Vacation Plan language and the unilateral implementation of the change was consistent with sixty years of similar benefit plan changes and did not violate the CBA.

For these reasons, the Employer asks the Arbitrator to deny the present grievance.

Discussion and Decision

The Arbitrator concludes that the Employer did not violate the Agreement between the Union and DuPont when the Company unilaterally changed the vacation compensation for earned vacation by its announcement of October 5, 2009 with the change effective December 31, 2010. There is nothing in Article II or Article VII of the Agreement which restricts the Employer from making the unilateral change at issue in the vacation accrual method for bargaining unit employees at the Parlin, NJ plant. The change was made corporate-wide throughout DuPont in the United States and more than a year's notice was given of the change. Thus, the Article VII requirements were met and the change was not prohibited by the Agreement.

Another Arbitrator has found that certain unilateral changes by DuPont in various benefits plans under a contract between DuPont and a different union did not violate Article II of that contract. The Arbitrator found that the obligation to bargain was clearly and unmistakably waived and that the subject was covered by Article VII which authorized the Company to act unilaterally. See E.I. DuPont de Nemours and Company and Ampthill Rayon Workers, Inc., Arbitrator Jaffe (February 15, 2010).

The NLRB has found that DuPont violated Section 8 (a) (5) and (1) of the Act by unilaterally implementing changes to the benefits of unit employees at a time when the Company and two other unions were engaged in negotiations for successor agreements and the parties had not reached impasse. See E.I. Dupont de Nemours, 355 NLRB Slip ops. 176 and 177 (August 2010). However, in those cases, the parties had agreed that the unions had waived their contractual rights to bargain over changes to the employees' benefits during the contract terms. The open question was whether the waivers survived the contract expirations. The Board answered this question in the negative.

In the present case, the parties do not agree that there was a contractual waiver of the Union's right to bargain over the effects of the December 31, 2010 change to the vacation plan accrual method at the Parlin, NJ plant. The change was made during the life of the Agreement and not after expiration.

The question of whether there was an "effects" bargaining obligation during the life of the present Agreement is not for the Arbitrator to decide. The question is for the NLRB in the charge pending there which was deferred to arbitration. The Board did not specifically address the issue of effects bargaining in the cases cited above. If the Union wishes to pursue this issue, the forum is the NLRB with the charge that is pending there.

Since there was no violation of Article II or Article VII of the Agreement in the December 31, 2010 change to the vacation plan accrual method, the present grievance is denied.

May 6, 2011

Marilyn Zuckerman